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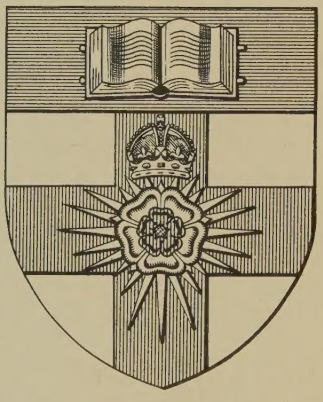

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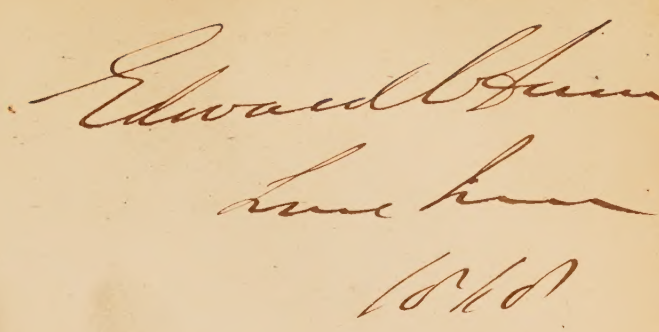

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November 4th, 1867.

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In the Bail Court,

BY

E. A. C. SCHALCH,
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XXX VICTORIA.

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CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXX VICTORIA.

BARRACLOUGH *v.* GREENHOUGH. 1866

Evidence—Probate of Will in common form, conclusive evidence as to Realty, under 20 & 21 *Vict. c.* 77, *s.* 64. *Nov.* 5.

Under s. 64 of 20 & 21 Vict. c. 77, if notice of the intention of one party to a cause to give in evidence the probate of a will, as proof of a devise of real estate, be given to the opposite party ten days before the trial, and within four days of the receipt of such notice a counter notice be not given that the validity of the devise is disputed, the probate in common form is *conclusive* evidence of the validity of the devise.

EJECTMENT for ten houses in the town and parish of Bradford, in the West Riding of Yorkshire.

The defendant defended for the whole.

At the trial, before Mellor, J., at the last summer assizes at Leeds, the defendant's counsel admitted the claimant's title as devisee of the heir-at-law of Ann Thomas, and relied on a devise to the defendant in a will of Ann Thomas. To establish this devise the defendant put in the probate of the will in the common form, and proved that a notice, addressed to the claimant and her attorney, of the defendant's intention to give in evidence the

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probate as proof of the devise to the defendant, was served on the claimant on the 14th of July, more than ten days before the trial; and it appeared that the claimant forwarded the notice to her attorney, who caused a notice to be served on the defendant, but not till the 21st of July, that the claimant disputed the validity of the devise.

The claimant's counsel claimed the right to contest the validity of the will on the ground of undue influence, and both parties were prepared with evidence on that point; but the defendant's counsel contended that as the claimant's notice had not been served within four days of the service of the defendant's notice, the probate was *conclusive* by reason of the 20 & 21 Vict. c. 77, s. 64. (1) Mellor, J., after consulting with Montague Smith, J., was of this opinion, and nonsuited the claimant.

(1) 20 & 21 Vict. c. 77, s. 62: "Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will; and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of Her Majesty's Court of Probate, shall, in all courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this act, or for the revocation of such probate or administration), be received as *conclusive* evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate. . . .

s. 64: "In an action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will, in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party (ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced) notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy thereof, stamped with any seal of the Court of Probate; and in every such case such probate, or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be *sufficient* evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided: unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

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D. Seymour, Q.C., moved for a new trial. The claimant ought to have been allowed to contest the validity of the devise. Section 64 of 20 & 21 Vict. c. 77, after the ten days notice and in the absence of the counter notice within four days, only makes the probate in common form "sufficient," that is, primâ facie evidence of the devise, whereas section 62 makes the probate in solemn form "conclusive;" the difference of the language is a very strong argument that it was not intended to give the same effect to the common probate as to the probate in solemn form. All that was intended by section 64 was that the probate should be evidence of the formalities required by the Statute of Wills, so as to dispense with proof of execution, and, in the absence of evidence to the contrary, to make out the title of the party putting it in evidence.

COCKBURN, C.J. I am of opinion that sections 62 and 64 must be read together, and, so reading them, that the construction of section 62 is that, where there has been a notice of the intention of one party to use the probate as proof of a devise of real estate, and no counter notice is given within four days by the other side that he disputes the validity of the devise, the probate in common form shall have the same operation and be of the same force and effect as a probate after proof in solemn form or an order in a contentious proceeding under section 62, that is, it shall be conclusive evidence of the validity of the will.

MELLOR and LUSH, JJ., concurred.

Rule refused.

Attorney for claimant: *Chinery, for W. P. Roberts, Manchester.*

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Nov. 7.

THE TRUSTEES OF THE DUKE OF BRIDGWATER'S ESTATES . . . . . } APPELLANTS;

THE SURVEYORS OF HIGHWAYS OF BOOTLE-CUM-LINACRE . . . . . } RESPONDENTS.

Evidence—Presumption—Parish, Boundary of—Land between high-water and low-water mark on tidal River.

Where a parish extends up to a tidal river, but there is nothing to shew whether it does or does not extend beyond the line of ordinary or medium high-water mark, land between such high-water and low-water mark cannot be assumed to be within the parish: as there is no distinction in this respect between land on the sea-shore and land on the shore of a tidal river.

CASE stated under 12 & 13 Vict. c. 45, on appeal to the Lancashire quarter sessions, against a highway-rate for the township of Bootle-cum-Linacre.

The following parts of the case are all that are material to the decision of the Court. (1)

The respondents, in exercise of the powers of the General Highway Act (5 & 6 Wm. 4, c. 50), assessed certain parts of the Liverpool docks in the occupation of the appellants to the highway-rate of the township of Bootle, on the ground that such premises were within that township.

The land upon which the docks occupied by the appellants have been constructed was situate on the foreshore of the river Mersey, between the ordinary or medium high-water and low-water mark; but the land has been reclaimed, and the tides no longer flow over it. Before the construction of these docks the township of Bootle extended on its western side along part of its course as far as the sea, and along other parts as far as the mouth of the river Mersey. There was nothing to shew whether the township of Bootle along its western side does or does not extend beyond the line of the ordinary or medium high-water mark; and, if necessary for the purposes of the case, the Court were to decide what is the western boundary of the township.

The Court were to have power to draw all such inferences of law and fact as they might think proper.

The question for the Court was, whether the appellants were

(1) See note (1), p. 5.

liable to be rated by the respondents in respect of the above premises, it being admitted that if the premises were liable to be assessed to the Bootle highway-rate, the appellants had been rightly rated. (1)

Aspinall, Q.C., for the respondents. The first question is, whether this land on which the dock is constructed, and which was formerly between high-water and low-water mark on the tidal river Mersey, is within the respondents' township. Land so situate, even on the sea-coast, may be within a parish. Thus in Hale de Jure Maris, c. 6 (Hargrave's Law Tracts, p. 27), it is said: "And as it" (land covered by the ordinary flux of the sea) "may be parcel of a manor, so it may be parcel of a vill or parish; and the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like. And upon this account the parson of Sutton, about 14 Car., had a verdict for the tithes of Sutton-marsh, in Lincolnshire, upon a long and a great evidence, though it appeared that within time of memory it was the mere shore of the sea covered at ordinary tides, and without the old sea-bank." This passage was acted upon in *Reg.* v. *Musson* (2); and no doubt it was there held that land so situate could not be assumed to be within the adjoining parish without some positive evidence.

[MELLOR, J. It is expressly found in the present case that there

(1) The township of Bootle adjoins the borough of Liverpool; and there were further questions raised on the case, as to how far the Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), under which these parts of the docks were constructed, coupled with the Municipal Corporation Acts (5 & 6 Wm. 4, c. 76, and 2 & 3 Wm. 4, c. 64), might have interfered with the right of the respondents to rate these premises; and it appeared that the corporation of Liverpool had also rated them to certain borough rates under those acts and certain other local acts; and it was stated in the case to be agreed between the parties that the corporation of Liverpool might be at liberty to appear on the argument of the case in support of their rates, on their consenting by their counsel to be bound by the decision of the Court. The opinion of the Court on the first point rendered the decision of the other points unnecessary for the determination of the present appeal in favour of the appellants; and the Court refused to allow any argument as between the corporation and the appellants, as it did not appear that there had been any appeal against the borough rates, and any decision on the points would therefore have been extra-judicial.

(2) 8 E. & B. 900; 27 L. J. (M.C.) 100.

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BRIDGWATER TRUSTEES v. BOOTLE-CUM-LINACRE.

was no evidence whether or not the township of Bootle extended beyond high-water mark.]

There is a distinction between the sea-shore and the shore of a tidal river. In *Rex* v. *Landulph* (1) the parish of Landulph was indicted for the non-repair of a highway. The road led across a small inlet or estuary of the river Tamar, not far from its mouth. It was not passable at high-water. It was, inter alia, contended that this road was not in the parish of Landulph. Patteson, J., held, on reference to the question of boundary, that where two parishes are separated by a river, and there is no positive evidence of the boundary-line between them, it is to be presumed to coincide with the middle line of the channel; and a verdict was accordingly found against the defendants. In *McCannon* v. *Sinclair* (2), which was the case of the Thames at Rotherhithe, Lord Campbell, C.J., makes the distinction between that case and *Reg.* v. *Musson* by saying: "There the parish abutted on the sea."

[LUSH, J. The decision in *McCannon* v. *Sinclair* (3) proceeded on the inference to be drawn from the different modes of perambulation.]

Lord Campbell's dictum, however, is in point for the respondents. But even if the land be not within the township, still it may be within a highway district; by section 5 of 5 & 6 Wm. 4, c. 50, a parish, as used to designate a highway district, includes, "parish, township, vill, city, borough, liberty, &c., or any other place or district maintaining its own poor."

[LUSH, J. How can that assist the respondents? They claim to rate the dock as being within the township of Bootle, of which they are the surveyors.]

Mellish, Q.C. (*Crompton* with him), for the appellants. The respondents have to shew that this land is within their township. There is no evidence on the point; at the least there is no presumption one way or the other as to land situate like the present, consequently the respondents must fail. There is no distinction between the sea-shore and the shore of a river where the tide flows. The treatise de Jure Maris, whether by Hale or not, is

(1) 1 M. & Rob. 393.
(2) 2 E. & E. at p. 56.
(3) 2 E. & E. 53; 28 L. J. (M.C.) 247.

always received as an authority; and after treating of fresh-water rivers, the author, in c. 4, proceeds to treat of "the sea and its arms," and says (Hargrave's Law Tracts, p. 12): "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows." . . . "But it seems that although the water be fresh at high-water, yet the denomination of an arm of the sea continues if it flow and reflow, as in the Thames above the bridge." He then proceeds to treat of the sea-shore without any distinction between sea and tidal river; and treating (at pp. 26, 27) of the land which is covered by the ordinary flux of the sea, he points out, in the passage already cited by the other side, how such land may be shewn to be within a parish. The treatise de Jure Maris was cited and acted upon in *Reg.* v. *Musson* (1), in which the Court held, that in the absence of positive evidence, land between high-water and low-water mark must be taken not to be within the adjoining parish. That decision is therefore conclusive in favour of the appellants. There must be some mistake in what is attributed to Patteson, J., in *Rex* v. *Landulph* (2); at all events there is no authority to support the ruling as applied to a tidal river.

MELLOR, J. There must be judgment for the appellants. The respondents have to shew that the premises they have rated are within their township. Now, in the absence of any evidence, such as perambulations or other acts by the parish authorities, the land between medium high-water and low-water mark cannot be presumed to be within the adjoining parish; the presumption seems rather to be that it is extra-parochial; and here there is no evidence on the point. I cannot help thinking that there must have been some misapprehension in the report of *Rex* v. *Landulph* (2), as what is attributed to Patteson, J., seems quite inapplicable to the circumstances of the case; at all events the ruling as reported is inconsistent with the authorities on the point: for there seems to be no distinction between the sea-shore and the shore of a tidal river. There is no foundation for this rating, either on the above principle, or on the construction of the Highway Act; and the respondents having failed to make out any primâ facie right to rate the dock, the

(1) 8 E. & B. 900; 27 L. J. (M.C.) 100. (2) 1 M. & Rob. 393.

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other questions are immaterial, and there must be judgment for the appellants.

SHEE and LUSH, JJ., concurred.

Judgment for the appellants.

Attorneys for appellants: *Wright & Venn.*
Attorneys for respondents: *Mackeson & Goldring.*

Nov. 10.

THE QUEEN, *on the prosecution of* MEYRICK, APPELLANT *v.* THE GUARDIANS OF THE POOR OF BATTLE UNION, RESPONDENTS.

Poor-Rate—Rateable Value—Right to take Game, when to be taken into account.

An owner of land, who is himself the occupier, but lets the right to take game to another, is assessable to the poor-rate in respect of his occupation as enhanced in value by the right to take game.

Reg. v. *Thurlstone* (28 L. J. (M.C.) 106; 1 E. & E. 502) discussed.

ON an appeal against a poor-rate for the parish of Dallington, in the Battle Union, in the county of Sussex, the quarter sessions amended the rate by reducing the gross estimated rental of the appellant from 22*l.* 10*s.* to 18*l.*, and the rateable value from 21*l.* to 17*l.* 10*s.*, subject to the following case:—

The land in respect of which the appellant was assessed was 91 acres of woodland, and was a portion of an estate of which he was owner, comprising a mansion and about 4000 acres of land, extending into the parishes of Brightling, Burwash, Battle, Mountfield, and Dallington. The mansion, garden and appurtenances, and 2600 acres of land were in the parish of Brightling, and about 450 acres were in the parish of Dallington. Of the 450 acres about 300 acres were let to various farm tenants; other part, containing about 3A. 2R. 27P., consists of pleasure grounds, which, with a summer house, a porter's entrance lodge, and two coach roads, all in the parish of Dallington, were held and occupied by Thomas Wilson, under a lease, and the remainder was in the appellant's own occupation. Of this land in the appellant's occupation 72 acres were saleable underwood, 11 acres was a furze field, and the remainder

consisted of fir plantations, in parts of which, estimated at about 8 acres, litter is cut, and these quantities together make up the 91 acres in respect of which the appellant is rated in the assessment appealed against.

The appellant did not personally enjoy the right of sporting and taking game on the 91 acres, but he derived a profit from it in the following manner:—

By indenture of the 1st September, 1863, the mansion, with gardens, stable, coach-houses, pleasure grounds, keepers' cottages, dog-kennels, &c., in the parishes of Brightling, Burwash, and Dallington, and the exclusive right of sporting and taking game over the entire estate of 4000 acres, comprised in the parishes of Brightling, Burwash, Battle, Mountfield, and Dallington (subject nevertheless to the appellant and his tenants having permission to destroy rabbits by any proper means, and also, during the months of September, October, and November, to course hares on the said estate), was demised to Thomas Wilson, at one entire rent of 350*l.* per annum, of which rent a portion is derived from, and is paid in respect of the right of sporting and taking game over the 91 acres; and Mr. Wilson was at the date of the rate and now is lessee under the lease.

The respondents contended that the appellant being the occupier of the woodlands in the parish of Dallington, and deriving a pecuniary profit from the shooting over the same, the value of the shooting was to be taken into account in estimating the rateable value of the lands.

The sessions found that the woodlands of the appellant would be worth 22*l.* 10*s.* per year to let, if the right of sporting and taking game over the same were let with the land, and 18*l.* a year, if such right were reserved to the landlord.

The question for the Court was, whether the appellant should be rated at the higher or the lower amount.

Field, *Q.C.*, and *Hurst*, for the appellant. The person to be rated is the occupier of the land, and he is to be rated in respect only of what he beneficially occupies. It has been decided in *Reg.* v. *Williams* (1), that if the occupier of a farm enjoys the privilege of

(1) 23 L. T. 76. 5 Jur. N.S. 811. n

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killing game, he is to be rated, not only for the land, but also in respect of the profit he has from the game; but it has also been decided that if the owner of land let it to one person, and grant the right to take game to another, so that the right to take game is not enjoyed by the occupier, he is to be rated only for the bare occupation of the land: *Reg.* v. *Thurlstone.* (1) In the present case, the owner of the land is the occupier, but he has granted the right to take game to another; consequently he is not liable to be rated for his occupation as of additional value by reason of his having once the right to take game, but which he no longer possesses. *Hilton* v. *Bowes* (2) is an authority in point to shew that he is not liable. It was held in that case, that where the right to take game is severed from the soil, it is neither itself assessable to the poor-rate nor can it be taken into account as enhancing the value of the occupation. So here, the occupation of the soil and the right to take the game, for a limited time at least, are not in the same person.

[COCKBURN, C.J. Because the appellant has himself separated them, but he gets an equivalent for the right to the game, and he gets this as the occupier of the soil.]

Not by reason of the occupation of the soil, but as a rent reserved on a lease for years of an incorporeal hereditament. The appellant receives the rent, not quà occupier of the soil, but quà owner. If he substituted a tenant in his place the tenant would not be rateable in respect of the game.

[MELLOR, J. Is the demise to Wilson anything more than a licence?]

It is a grant of a right in the nature of a profit à prendre, and not revocable: *Wickham* v. *Hawker* (3), *Wood* v. *Leadbitter* (4); and the game when killed would belong to the lessee: *Blades* v. *Higgs.* (5)

[LUSH, J. Can the owner of a farm rated at 100*l.* a year, by letting the shooting on the farm for 50*l.*, reduce the rateable value of the farm to 50*l.*?]

Things must be rated as they are at the time the rate is made:

(1) 28 L. J. (M.C.) 106; 1 E. & E. 502. 5 Jur. N.S. 820.
(2) Law Rep. 1 Q. B. 359.
(3) 7 M. & W. 63.
(4) 13 M. & W. 838.
(5) 34 L. J. (C.P.) 286; 11 H. L. C. 621. 11 Jur. N.S. 701

Reg. v. *Earl Pomfret.* (1) The rate is to be made upon the rent which a tenant from year to year would give rebus sic stantibus: *Staley* v. *Castleton.* (2) In that case it was held that a building no longer used as a cotton mill, but merely for the purpose of keeping the machinery together until the mill should resume working, ought to be rated as a warehouse for the machinery. The appellant, having granted the right to take game to Wilson, cannot be rated in respect of it: for any benefit or profit out of land to be rateable must result not from ownership but from occupation.

[LUSH, J., referred to *Overseers of Sunderland* v. *Guardians of Sunderland Union.* (3)]

Hannen and *Merrifield*, for the respondents. The principle on which the rate is to be made is perfectly clear. The occupier is the person to be rated, and he must be rated on the profits he derives from his occupation. If the appellant occupied the land with the right of taking game he would be rated in respect of value of his occupation, as enhanced by the profit he derived from taking game. So, if he let both to a tenant, the tenant would be rated in respect of the enhanced value; but if he let the land to one man and the right to take game to another, then the occupier of the land would be entitled to have the value of his occupation reduced, for he never had the right to the game. The cases are consistent. *Reg.* v. *Williams* (4) is an authority for the proposition that where a tenant has both land and game he is to be rated for both; *Reg.* v. *Thurlstone* (5) that where the tenant has not the right to the game he is not to be rated in respect of what he has not got. If the principle on which the rate is to be made is, that it is to be on the occupier in respect of the profits of his occupation, what difference in the value of the occupation can it make whether the appellant, who is the occupier, takes the game himself or derives a pecuniary consideration for the right which he has granted to another? Here the occupier had the right of taking game; he parts with it, but he receives an equivalent for it, and that is a value which he derives from the occupation of the land, and it is an element to be taken into account in esti-

(1) 5 M. & S. 139.
(2) 33 L. J. (M.C.) 178; 5 B. & S. 505.
(3) 34 L. J. (M.C.) 121.
(4) 23 L. T. 76.
(5) 28 L. J. (M.C.) 106; 1 E. & E. 502.

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mating the value of his occupation. *Hilton* v. *Bowes* (1) is no authority for the appellant; there it was sought to rate certain trustees in respect of a right to take game over a large area of land of which they were not in occupation; and the right to take game was not a profit derived from the occupation of the soil. Here the appellant is the occupier of the land having the right to take game; he lets the right of shooting, but he still remains in occupation of the land, and the letting of the shooting increases the value of his occupation. A tenant in occupation of land by giving for value to another a right over the land cannot reduce the rateable value of the land. If an occupier of land grant a right to another to come on his land to take underwood or even the growing crops at so much an acre, how can he say that the value of his occupation is diminished? The occupier does not have the underwood, but he has an equivalent. It was held in *Overseers of Sunderland* v. *Guardians of Sunderland Union* (2) that a contract made by a brewer with the tenants of his public-houses, that they should buy all their beer of him beyond the fair market price, was no ground for diminishing the rateable value of the public-houses. *Reg.* v. *Sherard* (3) is precisely in point; there a railway company let to another the right of jointly occupying a railway station, and it was held the company letting the station were to be rated as sole occupiers in respect of the whole, and were rateable at the increased value derived from the letting. The appellant is rateable at the higher sum, because the letting of the shooting is only a mode by which he realizes the profits of the land.

They were then stopped by the Court.

COCKBURN, C.J. I am of opinion that the sessions were wrong in reducing the rating of the appellant, and that he ought to be assessed at the higher amount. I quite agree that the case is one of considerable difficulty, independently of the case of *Reg.* v. *Thurlstone* (4) decided in this court. If we were dealing with a case in which the owner of the soil had reserved to himself, upon granting a lease of it, the right to take game as against the tenant, or if he had, by a valid grant, severed the right to take game, which is other-

(1) Law Rep. 1 Q. B. 359.
(2) 34 L. J. (M.C.) 121.
(3) 33 L. J. (M.C.) 5.
(4) 28 L. J. (M.C.) 106; 1 E. & E. 502.

wise incident to the occupation of the soil, and conveyed it to some other person, and then, after having divested the soil of that incident, let the land to a tenant, subject to the right thus granted, *Reg.* v. *Thurlstone* (1) would be an authority to shew that the occupier is not liable to be rated in respect of the annual value which arises from the right to take game. If that point had now arisen for the first time, I confess I should have hesitated in coming to the conclusion which the Court arrived at in *Reg.* v. *Thurlstone* (1), though I agree that the case is one of great difficulty and nicety. But I am happy to think that in the present instance we have not to deal with that question, because we have here the fact that the appellant is himself the occupier of the soil as well as the owner. Now the right to take game upon land is an incident to the occupation of the land. If the land is let without any reservation or any previous granting away of that right, the right follows as a necessary consequence of the right of occupation. If we find that the occupier of the land derives a benefit, whether from taking game himself, or from a pecuniary recompense made to him for allowing some one else to take it, it follows, inasmuch as the right to take the game is, ex concessis, merely an element of value, that where the two things are thus united in one person, the value of the right to game must be taken as an element in arriving at the rateable value of the occupation.

We have here something very different from the case of *Reg.* v. *Thurlstone* (1), in which, prior to a lease, prior to the occupation by the person sought to be assessed, the owner of the soil had detached the right to take game. We have here a person, who is the occupier, and who not only as owner but as such occupier would be entitled to take the game, making over that right to some one else in consideration of a yearly rent. Whether the tenancy is for more than a year or not appears to me to be indifferent. The occupier gets a yearly rent in respect of the right to take the game, which is an incident that attaches to the occupation of the soil. Therefore his occupation, as it appears to me, is productive to him of a value enhanced by the rent which he so receives.

I think, therefore, the sessions were wrong in reducing the rating, and that the appellant must be rated in the higher sum.

(1) 28 L. J. (M.C.) 106; 1 E. & E. 502: 5 Jur. N.S. 810

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MELLOR, J. I do not dissent from the opinion that my Lord has expressed; but I confess I do not see with the same clearness as my Lord and my Brothers the validity of the distinction upon which our judgment in this case must be based. *Reg.* v. *Williams* (1) has decided that the occupation of land may be enhanced in value by reason of the right to take game going with the land. *Reg.* v. *Thurlstone* (2) has decided (and I am not at all prepared to dissent from or express any doubt or dissatisfaction with that decision) that where the game is reserved, and the right never passes to the tenant at all, the tenant can only be rated according to the diminished value—diminished, I mean, from the value which would have been the value had the game not been reserved. The question therefore is, whether or not there is any real distinction, as to the rating of the actual occupier, between the case where a tenant of land by deed grants the exclusive right of sporting over it for a term, and where the owner grants the game to one and the occupation to another. I certainly think there is great force in the argument which was urged by Mr. Hannen, and which my Lord has adopted in a great measure. No doubt the conclusion at which my Lord and my Brothers have arrived is eminently consistent with common sense, but is it consistent with law? I do not quite see my way out of the difficulty, as to the legal effect of a grant to another of the game by the tenant, with the same clearness that they do; and therefore I cannot express my entire concurrence with the judgment and observations that my Lord has pronounced.

SHEE, J. I agree with my Lord that the sessions ought to have dismissed the appeal. The appellant is the occupier of his own land, and as an incident attached to the land he has a qualified property in the game on it. The land, therefore, has this additional value to him, that for the right to shoot the game on it granted by him to another, at proper seasons of the year, he receives an annual payment in money. It is true that he receives that under an agreement made by him before he was rated for this land, and that he is bound, under that agreement, to allow the person with whom he has entered into it to come upon the land and shoot the game at proper seasons. But for that grant he

(1) 23 L. T. 76. (2) 28 L. J. (M.C.) 106; 1 E. & E. 502.

receives annually an equivalent in money, and that receipt annually of an equivalent in money enhances to him the beneficial value of the land which is in his occupation. In the case of *Reg.* v. *Thurlstone* (1), the circumstances were quite different. The person there rated was not the owner of the land, but merely a tenant, without the right to touch any part of the game upon it, and he received in respect of his occupation of the land no equivalent for the game. The appellant in this case has the land with the game upon it, and he receives in respect of his grant to another person of the right of shooting the game an annual profit which enhances to him the beneficial value of his land. Therefore, as it seems to me, he is properly rateable for the additional value which attaches to his land in respect of the game.

LUSH, J. I agree in opinion with the majority of the Court. I am not prepared to say, if the point in *Reg.* v. *Thurlstone* (1) were now to occur for the first time, that I should concur in the judgment given in that case, or that I am now prepared to follow it out to all its consequences; but I think the test propounded by Wightman, J., in that case is peculiarly applicable to the present. In the course of the argument he says (2): "The question in all cases is, what would a tenant give for the tenement as the person rated has it?" Now, the person rated here, the owner, has the benefit of the occupation of this land, and he has, besides that, a money substitute for the right of shooting over it, which is incident to the land and an element of value belonging to it, and if he were to let that land to a tenant as he has it, the value of the right of shooting would come into account. I cannot distinguish this case in my own mind from that of an owner granting to another a right of way over land at a rent, and then letting the land with the benefit of the rent to a tenant. The two together would go to make up the rateable value of the land in the occupation of the tenant. On these grounds I concur with the majority of the Court.

Rate to stand without amendment.

Attorneys for appellant: *Chilton, Burton, & Co.*

Attorney for respondent: *Langham.*

(1) 28 L. J. (M.C.) 106; 1 E. & E. 502. (2) 28 L. J. (M.C.) at p. 109.

5 Jur. N.S. 820

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Nov. 21.

THE QUEEN *v.* BACKHOUSE.

*Local Board of Health, Election of—Chairman's Duties—*11 & 12 *Vict. c.* 63, *s.* 27—*Quo Warranto.*

1 QBD. 319.

At the election of members of a local board of health, under 11 & 12 Vict. c. 63, the chairman, or a duly appointed deputy, must attend at the office of the board the day after the election, as returning officer, and perform in person the duties, which are judicial, of examining the votes, &c., as required by s. 27; and if assessors, appointed under s. 21, make the examination in the chairman's absence, and he sign the returns, &c., on their report only, and not on personal inspection, the election is void.

THIS was a demurrer to a rejoinder in an information in the nature of a quo warranto.

The following is the substance of the pleadings:

The information alleged, that the township of Darlington had been formed into a non-corporate district under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and a local board of health constituted, consisting of eighteen members, and that the defendant had used the office of one of the members without legal right.

Plea, that on the 26th of September, 1864, there were six vacancies in the board, that an election of six members was held on that day, that the chairman of the board held the election pursuant to the provisions of the statute, that the chairman duly issued and gave previous notice of the election, as required by s. 26 of the statute, that the defendant was duly nominated as a candidate, being duly qualified; and there being more than six candidates nominated, the chairman caused voting papers in the form directed by the statute to be prepared, filled up, and delivered; that the chairman on the day of election, 26th September, caused the votes to be duly collected, and the defendant and five other candidates obtaining the largest number of votes, and the numbers and validity of the votes having been ascertained the day following the election, according to the provisions of the statute, the defendant and the five others were, and were certified by the chairman under his hand to have been, elected members of the board; and the chairman duly made out the certificate required by s. 27.

Replication, that after the notice, and before the election was

held, the chairman absented himself from the district, and went to Ireland, and remained there till after the election, and there signed the certificate mentioned in the plea, and the chairman did not on the day after the election attend at the office of the local board, and did not ascertain the validity and number of the votes given for each candidate, but suffered and permitted other persons to do this, and certified the candidates who had obtained the greatest number of votes merely on the faith of the report sent to him by these persons, and signed the certificate on the faith of such report. That no other person had been appointed by the local board to exercise or perform any of the powers and duties vested in and imposed upon the chairman in relation to the election.

Rejoinder, that the local board, before the election, appointed two persons to assist and attend upon the chairman in conducting the election; and the chairman being, by reason of defect in his eyesight, unable by personal examination to ascertain the validity of the votes, or personally to cast them up, conducted the election by those two persons, and did by them attend at the office of the local board, and perform the duties, &c., and they acted in all things in pursuance of his directions, he being at hand and consulted from time to time.

Demurrer and joinder.

Pickering, Q.C. (with him *Quain, Q.C.*), in support of the demurrer. The question is simply whether an election of members of a local board under the 11 & 12 Vict. c. 63, is valid in the absence of the chairman, who is returning officer. The duties imposed by s. 27 can only be performed by the chairman in person, or a deputy duly appointed under s. 21; the assessors appointed under that section cannot act without the chairman or deputy; the examination of the validity of the votes and the certificate in conformity with that examination are judicial acts, which cannot be delegated.

Manisty, Q.C. (*Rew* with him), for the defendant. The duties under s. 26 are clearly ministerial only.

[MELLOR, J. We so decided in *Reg.* v. *Lofthouse* (1), but we also pointed out the distinction that the duties under s. 27 were judicial.]

(1) Law Rep. 1 Q. B. 433.

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The assessors were duly appointed to assist the chairman, who may be taken to have acted by them.

PER CURIAM (Cockburn, C.J., Mellor and Lush, JJ.). There can be no doubt that the election is void in the absence of the chairman.

Judgment for the Crown.

Attorneys for relator: *Rogerson & Ford.*
Attorneys for defendant: *Lever & Son.*

Nov. 22.

IN THE MATTER OF THE PLAINT OF CHURCHWARD *v.* COLEMAN.

MAGGS AND ANOTHER, CLAIMANTS.

*County Court—Rule upon Judge of County Court to proceed—*19 *&* 20 *Vict. c.* 108, *s.* 43*—Jurisdiction of Court over Costs in County Court—Interpleader Claim, Particulars of.*

A judge of a county court having refused to hear an interpleader claim on the ground of insufficiency of particulars, and having ordered the claimant to pay costs, the Court, on ruling the judge, under 19 & 20 Vict. c. 108, s. 43, to hear the claim, has no jurisdiction to set aside the order as to costs.

Whitehead v. *Procter* (3 H. & N. 532) dissented from on this point.

RULE, under 19 & 20 Vict. c. 108, s. 43 (1), calling upon the judge of the county court of Surrey, holden at Farnham, and the plaintiff, to shew cause why the judge should not hear and adjudicate upon a claim made by J. H. Maggs and D. P. Loe to certain goods seized under an execution in a plaint of *Churchward* v. *Coleman*, and why the orders made in the same matter on the 14th

(1) 19 & 20 Vict. c. 108, s. 43: "No writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior court, or a judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer of a county court, and also the party to be affected by such act, to shew cause why such act should not be done; and if, after the service of such rule or summons, good cause shall not be shewn, the superior court, or judge thereof, may by rule or order direct the act to done; and the judge or officer of the county court, upon being served with such rule or order, shall obey the same on pain of attachment; and, in any event, the superior court, or judge thereof, may make such order with respect to costs as to such court or judge shall seem fit." See 21 & 22 Vict. c. 74, s. 4.

of August and 16th of September, imposing the payment of costs on the claimants should not be set aside or discharged.

It appeared from the affidavits that Churchward had recovered judgment in the county court against Coleman for 21*l*. Execution had issued against Coleman's goods, which were in his house and premises situate at North Camp, Aldershot, and Maggs and Loe claimed these goods as their property. An interpleader summons was thereupon issued.

The claimants served on the high bailiff the following particulars and grounds of their claim:

"Take notice, that the goods, chattels, and effects in and about the house and premises of the defendant, situate at North Camp, seized under a writ of execution herein, are the property of J. H. Maggs and D. P. Loe, the trustees named in, and appointed by, a deed of conveyance and assignment, dated the 24th of May, 1866, made between J. P. Coleman of the first part, J. H. Maggs and D. P. Loe of the second part, and the several creditors of J. P. Coleman, of the third part; by which deed J. P. Coleman conveyed and assigned all his estate and effects to the said trustees, absolutely to be administered for the benefit of all the creditors, as if he had been adjudicated bankrupt. And take notice, that the deed has been duly executed by the parties hereto of the first and second parts, and that the same has been left with the registrar of the Court of Bankruptcy, under and in pursuance of the provisions contained in the Bankruptcy Act, 1861, and that all the requirements of the act in relation to such deeds have been complied with by the debtor, the defendant."

At the hearing on the 14th of August, the execution plaintiff objected that the particulars and grounds of claim were insufficient, inasmuch as they did not describe the goods claimed; the judge allowed the objection and adjourned the hearing to the next court day, and ordered that the claimants should pay the execution plaintiff's costs of the day.

On the 16th of September, the next court day, the matter again came on for hearing, and the claimants having furnished no other particulars, the execution plaintiff again objected to the insufficiency; the judge allowed the objection, and ordered the claimants to pay the execution plaintiff's costs of the day.

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Prentice, Q.C., shewed cause, and admitted that he could not support the judge's decision as to the insufficiency of the particulars, and that that part of the rule calling upon the judge to hear and adjudicate on the claim must be made absolute; but he urged that the rest of the rule must be discharged, as this Court had no power to deal with the judge's orders imposing costs on the claimants.

Joseph Brown, Q.C., in support of the rule. The Court of Exchequer, in *Whitehead* v. *Procter* (1), decided that under s. 43 the Court has jurisdiction over the costs in the county court, and in the exercise of their discretion they ordered the claimant to be discharged from those costs. If this Court puts a different construction on the section, although the orders are founded on an erroneous decision, the claimants will have to pay the costs.

COCKBURN, C.J. The case of *Whitehead* v. *Procter* (1) is no doubt in point, but the matter was not much considered, no cause having been shewn against the rule. I think the Court of Exchequer did not give sufficient weight to the words of the section. We have jurisdiction to order the county court judge to proceed with the hearing, and we have power over the costs of the present application, but we have no jurisdiction to deal with the judge's order relating to the costs in the county court.

MELLOR, J. I concur in thinking that the words of the statute are not large enough to allow us to interfere with the orders relating to costs made by the county court judge.

LUSH, J. I am of the same opinion. The statute substitutes a rule for a mandamus, and only gives the superior court power over the costs of those proceedings. That part of the rule which calls on the judge to hear the claim must be made absolute, but as to the rest, it must be discharged.

Rule absolute accordingly.

Attorneys for claimants: *Linklater, Hackwood, & Addison.*
Attorney for plaintiff: *Franklin.*

(1) 3 H. & N. 532.

WOOD AND BARROW, APPELLANTS; BOWRON, RESPONDENT. 1866 Nov. 14.

Master and Servant—Threats to Master, under 6 *Geo.* 4, *c.* 129, *s.* 3—*Illegal Combination.*

At the hearing of an information against the appellants, W. and B., under 6 Geo. 4, c. 129, s. 3, for unlawfully, by certain threats, forcing, or endeavouring to force, the respondent to limit the number of his apprentices, the following facts were proved:—The respondent was a master builder, and the appellants were members of a Bricklayers' Association, W. being president and B. secretary. The respondent being engaged on a building, B. having spoken to two of the men, they left work; and on the respondent asking B. why the men had been stopped, B. said: "You must know; it is on account of your apprentices." The respondent at this time had four apprentices; and all his men stopped work, being at liberty, under their engagement, to leave at any time. Two or three weeks after the stoppage, the respondent wrote to B., as secretary of the association: "Will you inform me why my men were taken away from me? I heard it was because I employed too many apprentices; of this I had no notice. I should like you to let me know what you require me to do." At a meeting of the association, at which W. acted as president and B. as secretary, an answer was written by B., and sent to the respondent: "At a meeting of the society, it was resolved unanimously—That no society bricklayer will work for T. B. (the respondent) until he parts with some of his apprentices: namely, he will be allowed two; and when his oldest apprentice arrives at his last year, he will be allowed a third: and, further, there will be so much expenses to pay before any society bricklayer will work for T. B. —By order of the society." Shortly afterwards, a demand for 18*l.* was made on the respondent by W., who stated that the money must be paid before they would allow any man to work for him. The justices, "being of opinion that the evidence brought the case within s. 3 of 6 Geo. 4, c. 129," convicted the appellants of the above offence:—

Held, on a case stated under 20 & 21 Vict. c. 43, that, as the justices had not stated that they had drawn the inference that the communication of the resolution in answer to the respondent's inquiries was intended as a threat, the evidence without such inference (which the Court thought ought not to be drawn) was not sufficient to justify the conviction.

Quære, whether the combination of the workmen was illegal.

CASE stated by justices of Durham, under 20 & 21 Vict. c. 43.

At a petty sessions holden at Stockton, on the 20th December, 1865, an information was preferred by Thomas Bowron, builder (the respondent), against William Wood and Thomas Barrow, bricklayers (the appellants), under s. 3 of 6 Geo. 4, c. 129, charging that they, Wood and Barrow, did on the 28th October last past, at, &c., unlawfully, by using certain threats, force, or endeavour to force, the respondent to limit the number of his

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apprentices; and the appellants were convicted of the said offence, and sentenced each to one calendar month's imprisonment, with hard labour.

Upon the hearing of the information, it was proved on the part of the respondent, and found as facts, that the respondent was a master builder in Stockton, and the appellants were bricklayers, and members of a certain society or association called the United Order of Bricklayers, Wood being the president and Barrow the secretary. On a Monday morning in the early part of October last, the respondent was engaged at certain building in Stockton, and when there he saw the appellant Barrow and another man named O'Hare standing within about thirty yards of the building; the respondent sent two of his men for a ladder, when they were stopped by Barrow and O'Hare, who both spoke to them; the men then went back to the building and began to pick up their tools, and stated that they had been stopped by Barrow and O'Hare. The respondent then asked Barrow and O'Hare the reason why the men had been stopped, and they told him that he must know it was on account of his apprentices. In October last the respondent had four apprentices. All his men stopped at that time, with the exception of two bricklayers. There was no agreement between the respondent and his workmen with regard to the time that the engagement between them should continue; the men were at liberty to leave, and the respondent to discharge, at any time. About two or three weeks after the stoppage, the respondent wrote to the appellant Barrow the following letter:

"Norton Road, October 28, 1865.

To the Secretary of the Bricklayers' Union.

Sir,—Will you please to inform me what is the reason that my men were taken away from me? I have heard that it was because I employed too many apprentices; of this I had no notice. I should like you to let me know what you require me to do.

Yours respectfully, Thos. Bowron."

In reply, the respondent received the following letter, in the handwriting of Barrow:

"Black Horse, Oct. 28.

Sir,—At a summonsed meeting held at the above place of the United Order of Bricklayers, it was proposed, seconded, and carried

unanimously, that no Society Bricklayer will work for Thomas Bowron until such times as he parts with some of his apprentices; namely, he will be allowed two, and when his oldest apprentice arrives to his last year of servitude, he will be allowed a third, and until then there will be no Society Bricklayer work for him; and, further, there will be so much expenses to pay as well before any Society Bricklayer will work for the said Thomas Bowron. By order of the Society."

It was proved to the satisfaction of the justices, and they found, as a fact, that this letter was written at a meeting of the United Order of Bricklayers, at which meeting Wood acted as chairman and Barrow as secretary.

Shortly after the receipt of the above letter, the respondent had a demand made upon him for 18*l.* by Wood, who stated that the money must be paid before they would allow any men to work for the respondent. In reply to the letter received by the respondent from Barrow, the respondent again wrote to Barrow, requesting to know upon what terms he would be allowed to have men; and in answer he received a letter to the effect that it would be decided at a general meeting to be held on the Thursday following. On the 28th November, the respondent sent his foreman, George Lazenby, to the Bricklayers' Union, at their request. He saw Wood there, who told him that he supposed he (Lazenby) had come to know the result in Mr. Bowron's case, and Lazenby replied that he had. Wood then said the decision they had come to was, that Mr. Bowron must pay 18*l.* expenses incurred by the society, otherwise the men would not be allowed to go to work.

The justices being of opinion that the evidence brought the case within the operation of s. 3 of 6 Geo. 4, c. 129, gave their determination against the appellants in the manner before stated.

If the Court should be of opinion that the conviction was legally and properly made, and the appellants are liable as aforesaid, the conviction was to stand; but if the Court should be of opinion otherwise, the complaint was to be dismissed.

Manisty, Q.C. (*Pinder* with him), for the respondent. The appellants were convicted under 6 Geo. 4, c. 129, s. 3, which makes it an offence, "by violence to the person or property of another,

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or by threats or intimidation, or by molesting or in any way obstructing another, to force, or to endeavour to force, any manufacturer, or person carrying on any trade or business, to make any alteration in his mode of regulating, &c., such business, or to limit the number of his apprentices, or the number or description of his workmen, &c." A threat to do any illegal act is within this section, and it need not be a threat of violence: *Walsby* v. *Anley*. (1) There are, therefore, two questions in the present case: first, whether the combination was illegal; secondly, whether there was evidence of threats to do this illegal act. Assuming the combination to be illegal, there was evidence of a threat. The facts of this case are somewhat similar to those of *O'Neill* v. *Longman* (2), in which it was held that there was sufficient evidence of a threat; and the case is distinguishable from *O'Neill* v. *Kruger* (3), where the obnoxious resolution had not been communicated to the person against whom it was passed. And what Wightman, J., said in that case (4) meets the objection, that the resolution was only communicated in answer to inquiries by the master in hopes of coming to an arrangement: "What passed between the appellant and respondent was not a mere attempt to arrange the matter in dispute, but an endeavour to coerce the respondent not to employ the obnoxious workman by a threat that, if he did, no member of the club would be allowed to work for him; and the facts well warranted the conclusion of the magistrate."

[MELLOR, J. The contention for the respondent must be that it was a question for the magistrates, whether a threat was intended, whether the men took advantage of the master's inquiry to threaten him.

COCKBURN, C.J. I doubt very much whether anything of the kind passed through the minds of the justices; they have not said that they drew that inference.]

They have convicted the appellants, and it must be taken that they drew the inference, if necessary. The facts from first to last, from the time the men were first taken away to the demand of 18*l*., shew a conspiracy to coerce the master; and what passed between

(1) 30 L. J. (M.C.) 121. 7 Jur. N. S. 465. (3) 4 B. & S. 389.
(2) 4 B. & S. 376; 32 L. J. (M.C.) 259. (4) 4 B. & S. at p. 395.
10 Jur. N. S. 748

the respondent and appellants might well be held to amount to a threat.

J. D. Coleridge, Q.C. (*Macnamara* with him), for the appellants. This is a joint conviction. The facts of the case may well be arranged in three stages, and in not one of them were both the appellants engaged. On the first occasion Barrow only was present. Secondly, at the meeting after the respondent wrote to Barrow, Wood was present; but it is not shewn that he took any part in the letter; mere presence is not sufficient: *O'Neill* v. *Longman.* (1)

[COCKBURN, C.J. Wood was chairman.]

It does not appear whether he assented to the letter being sent. Moreover, the resolution was passed at a former meeting, and non constat that either of the appellants were present at that meeting. Thirdly, the demand of 18*l.* is only made by Wood; Barrow is not shewn to have had anything to do with it.

[LUSH, J. The last is not the threat on which the appellants were convicted.]

No; even if illegal, it had nothing to do with the limit of the number of apprentices. [He then argued that the resolution was not an illegal combination; as the Court pronounced no decision on this point the argument is omitted.]

Manisty, Q.C., in reply. It was a question for the justices, and them alone, whether what was done by the appellants was done as a threat, and they have convicted the appellants; therefore it must be assumed that they drew that inference.

COCKBURN, C.J. I am of opinion that this conviction must be quashed. It is quite unnecessary to determine, in the present case, whether the combination of the workmen forming this association, and the resolution which they adopted that no member of the society would work for the respondent until he reduced the number of his apprentices, would be, at common law, lawful or not. I quite agree with Mr. Coleridge that the cases ought not to be pressed further than they have gone; and we ought, as long as nothing is done contrary to the law, to leave it open to labour on the one hand and capital on the other to make the best terms they can for themselves. Large numbers of men, who have not

(1) 4 B. & S. 376; 32 L. J. (M.C.) 259.

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the advantage of wealth, very often can protect their own interests only by means of association and co-operation, and we ought not to strain the law against men who have only their own labour and their association by which they can act in the assistance of one another. Nevertheless, there may be combinations which are contrary to the law—contrary to the statute law or the common law, as the case may be. It is unnecessary, however, to determine the important question of law, whether such a combination as the present was lawful or not. The conviction is under this particular statute; and in order to sustain the conviction, it is necessary that there should be a threat or intimidation with the object of compelling the master to alter the conduct of his business, or to limit the number of apprentices he may employ. It is most important, therefore, to look at the facts, in order to ascertain whether there was a threat or intimidation such as is the subject-matter of the conviction. It seems that certain members of the association, of which the appellants are respectively chairman and secretary, were in the employment of Mr. Bowron, the respondent. On a certain day, without notice to him, certain of his workmen, having been seen in conversation with the appellant Barrow, suddenly leave his service, no threat at the time being made to the master. The men having left, he inquires of Barrow why the men left. Barrow simply says: "You must know that it was in consequence of your apprentices." In that I can find no threat on the part of Barrow, still less a threat by Wood. The master is the next person who moves in the matter. There is no communication made to him spontaneously by the association; the resolution bears no semblance of an intention to intimidate him by means of a threat; but the master himself, not only for the purpose of ascertaining what was the cause for which the men had withdrawn from his employment, but evidently for the purpose of entering, if possible, into an arrangement with the society, puts himself in motion, and writes to ask what are the reasons and the grounds for which these men are withdrawn. Upon that a letter is written by Barrow at a meeting, at which it appears the appellant Wood presided, for which letter, therefore, I think, if it amounted to a threat, Wood would have been responsible. The letter, however, which Barrow writes, upon the face of it, appears to be merely an explanation of

how it came to pass that these men had left the respondent's employment. Now, inasmuch as it is not for the combination, as it is not for the resolution, as it is not for what may have been done under the resolution, either by the society or by the men leaving, that this information was laid or this conviction has been obtained, but for a threat, we must see whether the letter written under the circumstances I have adverted to amounts to a threat. I think that it does not. If there had been anything to shew that the letter purporting to afford an explanation by way of answer to a question put by the employer had been intended really to convey a threat, and the magistrates had come to that conclusion, and said, "We think that the defendants have, under the guise of an explanation, conveyed that which was intended to be a threat," that would have been another matter. I must say I do not think there is enough to warrant this inference under the circumstances, seeing that the master himself invited the explanation. The appellants merely told him what had been the cause of the withdrawal of the men, and I think that that does not amount to a threat within the terms of the act of parliament. Upon that ground I think that the conviction cannot be sustained. Mr. Manisty has pointed out, with truth, that this was a matter on which it was for the magistrates to adjudicate. If they had drawn the inference that what had been done had been done under the guise of an explanation, but really with the intention of conveying a threat, that might have made all the difference. But the magistrates have not drawn that conclusion; they have submitted the whole case to us upon the evidence; and unless we can say that the magistrates were bound to draw the inference, we must not assume that they have done so, when we think that they ought not. Therefore, it is competent to us to look at all the circumstances of the case, to satisfy ourselves whether there can be a conviction against these men of having sent this letter with the intention and purpose of conveying a threat. Under all the circumstances of this case, I think this was neither more nor less than an answer and an explanation to the master, who was evidently desiring to enter into a negotiation; and I do not think there is enough to justify an inference that this letter was written malâ fide. Therefore I think the conviction should be quashed.

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MELLOR, J. I am of the same opinion. It is quite unnecessary in this case, as it seems to me, to express any opinion as to how far the act of the men in meeting and coming to that resolution was or was not lawful at common law. The authorities seem to differ as to how far combination may make an act unlawful. Lord Campbell, in *Hilton* v. *Eckersley* (1), expresses a strong opinion in favour of the right of labour to combine as to wages; and the late Mr. Justice Crompton, in that case and in the case of *Walsby* v. *Anley* (2), seems to differ in opinion with Lord Campbell. It is not necessary to determine in this case how far the legality of the act is affected by the actual combination. I am clear that to sustain the conviction the justices should have found as a fact that the defendants, under colour of giving the answer which they did to the application of the master, took advantage of the opportunity to urge that which amounted to a threat, and which they intended to operate as a threat. Now, if the justices had found that as a fact, of course I should have had very great difficulty in coming to any other conclusion than that the conviction was legal. But the justices have abstained from that finding; they have merely stated the evidence generally, without drawing any inference; and the evidence shews, as far as I can judge, that this was an answer bonâ fide made to an application for information on the part of the master as to what was the reason why the men had left. If so, it evidently was no threat. It appears to me that, upon the facts so stated, we cannot draw the inference that it was malâ fide; we must look at the mere circumstances as the justices have stated them. It is not sufficient that the justices were in a condition to draw a conclusion one way or the other; they have not done so, and certainly we are not to do it.

SHEE, J. I am of the same opinion. I think that the facts of this case have been very conveniently submitted to us as in three stages by Mr. Coleridge. As to the last of those stages, that has, I think, been satisfactorily disposed of. The fact of Wood asking for 18*l.* for the costs and expenses the society had been put to had nothing to do with the threat of which the appellants were convicted by the magistrates, viz. of "having unlawfully, by using

(1) 24 L. J. (Q.B.) at p. 359; 6 E. & B. at p. 62. (2) 30 L. J. (M.C.) 121.

certain threats, forced, or endeavoured to force, their employer to limit the number of his apprentices." They were convicted of this threat; and taking the first stage proposed by Mr. Coleridge, was the passing of that resolution a threat? Is it an intimation given to any person with the intention at the time it is made of forcing or unduly influencing his conduct? It does not appear upon this case that at the time that resolution was passed either of the appellants was present at the meeting. But independently of that, supposing that they had been present at the meeting, the resolution itself, though the name of Mr. Bowron is mentioned in it, does not appear to have been intended to be communicated to him; it is in its terms nothing but a resolution in the shape of a rule of conduct agreed on by the members of the United Order of Bricklayers. If it had been communicated to the respondent, his name being mentioned in it, at the time it was made, then, indeed, there might be ground for contending—and I should not be indisposed to think, upon the authority of *Walsby* v. *Anley* (1)—that the communication of it was a threat. There being, however, nothing of any kind to shew it was intended to communicate the resolution to the respondent, it seems to me the fact that it was not communicated to him at the time takes it clearly out of denomination of a threat; for there cannot be a threat to any one unless it be intimated to him. A threat must be an intimation made with the intention of forcing or unduly influencing the conduct of the person to whom it is addressed. Then, on the second stage of the case, to which Mr. Coleridge invites our attention, was the communication of this resolution on the 28th of October a threat? I think not. A threat must be an intimation given by a person of his own accord, and within this statute it must be made with an intent to coerce or endeavour to force the future conduct of the person to whom it is addressed. In considering whether this communication of the resolution was a threat, we must look at the words and essence of the resolution itself. It purports to be nothing but a rule of conduct of the members of the Order of United Bricklayers: moreover, it was communicated long after it was made—possibly more than a month after it was made—and then in answer to an inquiry. It seems to me that it was only in-

(1) 30 L. J. (M.C.) 121; 7 Jur. (N.S.) 465.

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formation given at the master's request. The resolution does not appear to have been intended to be communicated to him at the time it was made. It was sent as information in answer to his inquiry, "Why did these men leave my employment?" "They left it because the resolution was passed by the society of which they are members, and that is now communicated to you." There is nothing in the case to shew that what was done was done in the way charged, as a threat, in order to force the respondent to change his mode of conducting his business for the future. It appears to me, therefore, that the conviction should be quashed.

LUSH, J. I am also of the same opinion, that there is no evidence to sustain the conviction. After the decisions that have been given upon this statute, it is too late to say that the word "threat" is limited to the declaration of an intention to do those acts with which it stands in intimate connection, viz. acts of violence to the property or person of another. The cases that have been decided shew that the word must have a wider sense; namely, a threat by act or words of doing some injury to another person. But I apprehend that it is the very essence of a threat that it should be made for the purpose of intimidating or overcoming the will of the person to whom it is addressed. Now, here a resolution was come to not to work for the particular master until he reduced the number of his apprentices. Whatever its quality might be at common law, certainly it is per se no offence against the statute. Nevertheless, it might have been so used as to constitute a threat. The question in my mind is, whether it was used for such a purpose as to be construed a threat within the meaning of the statute. When I find the resolution previously passed was not communicated to the master except in answer to his inquiry, by way of explanation why these persons had left his employment, and then communicated simply for the purpose of giving that information, it seems to me that there are wanting the essential elements of a threat. Therefore I am of opinion that the appellants were not rightly convicted.

Conviction quashed.

Attorneys for appellants: *Chinery, for W. P. Roberts, Manchester.*

Attorneys for respondent: *Hollings, Sharp, & Ullithorne, for Dodds & Trotter, Stockton.*

MARKS *v.* HALL.

1866
Nov. 22.

Debtor and Creditor—Arrest—Composition Deed—Discharge from Custody under Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 198.

A debtor was arrested on a ca. sa., and while in prison he executed and caused to be registered a composition deed under s. 192 of the Bankruptcy Act, 1861 :—*Held*, that although the deed was both executed and registered after the arrest the debtor was entitled to his discharge under s. 198.

30 L. J. 644

THE plaintiff, having obtained judgment for 50*l.* 16*s.* 3*d.* against the defendant in an action on a bill of exchange, on the 7th of August sued out a writ of ca. sa, under which the defendant was arrested and detained in the custody of the sheriff of Middlesex. On the 16th of August, while in prison, he executed a deed of arrangement for the benefit of his creditors under section 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134). The deed was executed by a majority in number representing three fourths in value of the creditors, and was filed and registered on the 3rd of September, and a certificate of protection granted by the chief registrar.

A rule having been obtained calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff,

Sawyer shewed cause. It is admitted that the deed is valid; the question is, the defendant having been arrested before the execution of the deed, is he entitled to his discharge under section 198 of the Bankruptcy Act, 1861? That section provides "that after notice of the filing and registration of such deed"—that is, a deed under section 192—"no process against the debtor's person in respect of any debt . . . shall be available to any creditor or claimant without leave of the Court." The words "no process shall be available" mean available for caption, but not for the detention of a debtor in gaol; that is the construction that was put on the words by Mr. Commissioner Holroyd in *Ex parte Chaundy* (1); and it is a reasonable construction; for if the debtor is in prison, the registrar attending at the prison, under s. 101,

(1) 5 L. T. (N.S.) 526.

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after examination of the debtor, has authority to grant him protection and release him. In *Baerselman* v. *Langlands* (1), the debtor had executed the deed before he was arrested, and it was held that on registration of the deed he was entitled to his discharge; but there is no case which decides that where the deed is executed as well as registered after the arrest the debtor may be discharged from custody.

Morgan Lloyd, in support of the rule, was not called upon.

COCKBURN, C.J. I think the language of s. 198 is too strong to be got over. The words "no process against the debtor's person in respect of any debt shall be available to any creditor" are general and relate to all process against a debtor, and mean that the process shall cease to have any effect against him. Though the creditor had a vested right to detain the debtor, yet, when the deed was registered, the debtor was entitled to his release, and therefore must be discharged from custody.

MELLOR, J. I also think that after the registration of the deed the defendant is entitled to his discharge from custody. To give the section the narrower construction contended for by Mr. Sawyer, the words should have been "no process shall issue," not "no process shall be available."

SHEE and LUSH, JJ., concurred.

Rule discharged. (2)

Attorneys for plaintiff: *Deane, Chubb, & Co.*
Attorneys for defendant: *Foster & Anderson.*

(1) 34 L. J. (Ex.) 3; 3 H. & C. 433.
(2) See *Rogers* v. *Roberts*, Law Rep. 2 Ex. p. 35.

FELTHAM *v.* ENGLAND.

1866
Nov. 24.

Master and Servant—Liability of Master to Servant for Negligence—Foreman a Fellow Servant.

The rule, that a master is not liable to a servant for injuries sustained from the negligence of a fellow servant in their common employment, is not altered by the fact that the servant guilty of negligence is a servant of superior authority, whose lawful directions the other is bound to obey.

The defendant was a maker of locomotive engines, and the plaintiff was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood supported by piers of brickwork. The piers had been recently repaired, and the brickwork was fresh. The defendant retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved on, having just before ordered the plaintiff to get on the engine to clean it. The plaintiff having got on the engine, the piers gave way, the engine fell, and the plaintiff was injured. This was the first time the crane had been used and the plaintiff employed in this manner:—

Held, that there was no evidence to fix the defendant with liability to the plaintiff: for that, assuming the foreman to have been guilty of negligence on the present occasion, he was not the representative of the master so as to make his acts the acts of the master; he was merely a fellow servant of the plaintiff, though with superior authority; and there was nothing to shew that he was not a fit person to be employed as foreman; neither was there any evidence of personal negligence on the part of the defendant, as there was nothing to shew that he had employed unskilful or incompetent persons to build the piers, or that he knew, or ought to have known, that they were insufficient.

DECLARATION that the plaintiff was employed by the defendant as his servant in the capacity of painter, and to wash the dust from a locomotive engine of the defendant, which was then suspended from a travelling crane of the defendant which was then in motion and travelling along beams of the defendant, supported by piers of the defendant, and the defendant then had the care, management, and direction of the piers, beam, crane, and engine, and was then using and working the same in his business of an engineer, that the defendant so carelessly and negligently and improperly managed his business and directed the said piers, &c., that through his negligence the piers and beams were subjected to a weight they were not fitted to bear, and gave way, and the crane and ruins fell on the plaintiff whilst so engaged in the service of the plaintiff, whereby, &c.

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Pleas: First, not guilty; Second, that the defendant had not the care and management or direction of the piers, &c.; Third, that the defendant had the care, management, and direction of the piers, &c., by means of his servants, that is to say, the plaintiff and others his fellow servants, and not personally, and the defendant had then no knowledge of the alleged carelessness, or that the piers and beams were subjected to a weight they were not fitted to bear, and the supposed grievances were committed by the defendant's servants, being the fellow servants of the plaintiff, and not by the defendant personally.

Issue thereon.

The cause was tried before Cockburn, C.J., at the sittings in Middlesex after Trinity Term, 1865; a verdict was returned for the plaintiff, with leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of the liability of the defendant.

A rule having been obtained accordingly,

June 4. *Daly* shewed cause.

M. Chambers, Q.C., and *Hance*, in support of the rule.

The facts and arguments sufficiently appear from the judgment of the Court. In addition to the cases noticed by the Court, the following authorities were cited:

Addison on Torts, 2nd ed. p. 156.
Feltham v. *England*, 4 F. & F. 460.
Grizzle v. *Frost*, 3 F. & F. 622.
Holmes v. *Clarke*, 31 L. J. (Ex.) 356; 7 H. & N. 937.
Brown v. *Accrington Cotton Co.*, 34 L. J. (Ex.) 208; 3 H. & C. 511.
Bartonshill Coal Company v. *Reid*, 3 Macq. 266.

Cur. adv. vult.

Nov. 24. The judgment of the Court (Cockburn, C.J., Mellor and Shee, JJ.) was delivered by

MELLOR, J. This case stood over on the suggestion, that another case was pending for argument before us, which involved the same points. The case referred to, on the hearing a few days ago, was found not to involve any question applicable to the present. (1)

(1) *Webb* v. *Rennie*, Nov. 5.

We therefore give our judgment upon the facts which appeared on the trial of this case.

The defendant was a maker of locomotive engines, employing a great number of men, amongst them the plaintiff. In the course of the work, a travelling crane was used to hoist the engines and convey them to tenders for their carriages. The crane moved on a tramway, resting on beams of timber, and supported by piers of brickwork; the piers had been recently partly repaired and partly rebuilt, and the brickwork was fresh. It appeared that at the time of the accident, the piers first gave way, and then the beams broke from the strain thus cast upon them. The accident occurred on the first occasion of using the crane, and it was the first time that the plaintiff had been employed upon it. There was no evidence that there was any defect in the crane, or negligence in the mode in which it was used, or that the engine was of unreasonable or improper weight. There was no evidence of any personal privity or interference by the defendant; but his foreman or manager was present, and gave the directions to hoist the engine. The traveller was worked by six men, three at one end, and three at the other. As the crane moved along it oscillated, and the foreman, thinking that the men were not working it properly, directed them to stop, which they did for a minute or so. He then ordered them to move on again, which they did: just before that he had ordered the plaintiff to get on the engine and clean it. The plaintiff did so, and was on it whilst in motion for the purpose, and whilst he was so engaged some mortar fell, the pier gave way, and the engine fell, and the plaintiff's arm was broken.

Upon objection by the defendant's counsel, that there was no case to go to the jury to fix the defendant with liability, either personally or for the act of his manager or foreman, the Lord Chief Justice reserved the question for the Court, and the case went to the jury, who found for the plaintiff, with 200*l.* damages.

On the argument before us, it was contended, that the defendant was liable on two grounds: First, it was urged that the foreman or manager was an "alter ego" of the master, and not a fellow servant of the plaintiff, and that he was guilty of negligence in not ascertaining the sufficiency of the piers before he ordered the plaintiff to get upon the engine, to clean it, as it travelled along.

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Secondly, it was urged that there was evidence to fix the defendant personally with negligence, in permitting the engine to be removed by means of the piers when he might, and ought to have known, that the piers were not sufficient for the purpose.

We are of opinion that the plaintiff is not entitled to succeed on either ground.

We think that the foreman or manager was not, in the sense contended for, the representative of the master. The master still retained the control of the establishment, and there was nothing to shew that the manager or foreman was other than a fellow servant of the plaintiff, although he was a servant having greater authority. As was said by Willes, J., in *Gallagher* v. *Piper* (1): "A foreman is a servant as much as the other servants whose work he superintends."

There was nothing in the present case to shew that the foreman was an incompetent or improper person to be employed as foreman or manager. We are unable to distinguish the case on this point from that of *Wigmore* v. *Jay* (2), *Gallagher* v. *Piper* (3), and *Skipp* v. *Eastern Counties Railway Company*. (4)

We think that this case ranges itself with a great number of cases, by which it must be considered as conclusively settled, that one fellow servant cannot recover for injuries sustained in their common employment from the negligence of a fellow servant, unless such fellow servant is shewn to be either an unfit or improper person to have been employed for the purpose: *Morgan* v. *Vale of Neath Railway Company*. (5) And this rule is not altered by the fact that the servant to whom the negligence was imputed, was a servant of superior authority, whose lawful directions the plaintiff was bound to obey.

It is difficult in the present case to discover any evidence that the foreman was guilty of any negligence; but the conclusion at which we have arrived renders it unnecessary to determine that.

With regard to the second ground relied upon on the part of the plaintiff, we can find no evidence of personal negligence to fix

(1) 33 L. J. (C.P.) at p. 335; see also 16 C. B. (N.S.) at p. 694.

(2) 5 Ex. 354; 19 L. J. (Ex.) 300.

(3) 33 L. J. (C.P.) 329; 16 C. B. (N.S.) 669.

(4) 9 Ex. 223; 23 L. J. (Ex.) 23.

(5) 5 B. & S. 570; 33 L. J. (Q.B.) 260: in Ex. Ch. 5 B. & S. 736; Law Rep. 1 Q. B. 149.

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the master. There was nothing to shew that he had employed unskilful or incompetent persons to build the piers, or that he did know, or ought to have known, that they were insufficient for the use to which they were applied. He was a maker of engines, and, therefore, in that sense, an engineer, but not in the sense that he possessed special knowledge as to the strength or sufficiency of brickwork. We cannot in the absence of such evidence say there was any case fit to be submitted to the jury as to this ground of liability; and we think that the rule to enter a nonsuit ought to be absolute.

Rule absolute.

Attorney for plaintiff: *J. Olive.*
Attorney for defendant: *O. Richards.*

THE MADRID BANK, LIMITED *v.* BAYLEY.

Nov. 26.

Interrogatories—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 51 *—Practice—Who entitled to attachment—Companies Act*, 1862—*Officers of Body corporate—Official Liquidator.*

An action having been brought by an official liquidator, in the name of a company that was being wound up by the Court of Chancery, to recover arrears of calls, the defendant obtained an order to administer interrogatories to certain directors of the company, and for a stay of proceedings. The directors not having answered the interrogatories, an application was made by the official liquidator for an attachment against them:—

Held, that the directors did not cease to be officers of the company on the commencement of the winding-up, and that they were therefore bound to answer the interrogatories; and that although the official liquidator was not the party who had obtained the order for the interrogatories, nor a party on the record, he was under the circumstances so interested in the matter as to be entitled to apply for an attachment.

THIS was a rule calling on four directors of the Madrid Bank, Limited, to shew cause why a writ of attachment should not issue against them for not answering certain interrogatories.

On the 18th of March, 1865, an order was made by the Master of the Rolls for winding up the Madrid Bank, Limited, and on the 25th of April, 1865, an official liquidator was appointed.

On the 20th of February, 1866, the official liquidator com-

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menced this action in the name of the Madrid Bank, Limited, against the defendant as a shareholder, to recover arrears of certain calls.

On the 26th of June a judge's order was made, that the directors of the Madrid Bank, Limited, should answer certain interrogatories of the defendant, and on the 6th of July the defendant obtained an order for a stay of all proceedings until the answers to the interrogatories should be filed.

The directors did not answer the interrogatories, and this rule was in consequence obtained by the official liquidator.

Milward, Q.C., and *C. Russell*, shewed cause. (1) The directors are not bound to answer these interrogatories. They are not parties to the suit upon the record, and they can only be liable to answer as officers of the company under the 51st section of the Common Law Procedure Act, 1854. In order to bring the directors within this section, it must be shewn that they were officers of the Madrid Bank at the time the order to administer these interrogatories was made. The directors had, however, before that time ceased to be officers of the company. The Madrid Bank was being wound up at the commencement of this action, and the directors ceased to be its officers from the beginning of the winding-up. The 84th section of the Companies Act, 1862 (25 & 26 Vict. c. 89), provides that a winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up. From the commencement of the winding-up the official liquidator has the whole control and management of the affairs of the company, and the directors have nothing more to do with them. The directors then cease to have any powers whatever as directors, and therefore cannot be considered as officers of the company. The term officers of a corporate body in the 51st section of the Common Law Procedure Act, 1854, can only apply to those who are in some way concerned in the management of the company, and means those over whom the body corporate has some control, and who may thus be said to represent the company, as a corporation cannot answer for itself. It is to be remembered also that in a case like this, where the

(1) In the Bail Court, before Blackburn and Shee, JJ.

official liquidator is the real plaintiff, and the directors have no control over the proceedings in the action, an order to administer interrogatories is obtained behind the backs of the directors, who would in an ordinary case, where the company was not being wound up, have an opportunity of opposing an application for such an order, or of objecting to any particular questions. In this case they have had no such opportunity, and yet they are called on to answer these interrogatories, to which they have not had the power of objecting before the order was made. The proper course for the official liquidator to take would be to apply to the Court of Chancery, which has now control over the affairs of this company, and he could there obtain any remedy to which he may be entitled. Even if the directors are bound to answer, still the Court will not make this rule absolute, as an application of this nature should be made by the person who obtained the order, that is, in this case, the defendant, and not by the official liquidator, who is in the position of a stranger, so far as the proceedings to obtain this discovery are concerned.

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Powell, Q.C., and *Laxton*, were not called upon in support of the rule.

BLACKBURN, J. The foundation of these proceedings is the 51st section of the Common Law Procedure Act, 1854, which enacts that in all causes in any of the superior courts, by order of the court or a judge, the plaintiff or defendant may deliver to the opposite party interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days, to answer the questions in writing by affidavit, and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought, shall be deemed to have committed a contempt of court, and shall be liable to be proceeded against accordingly. Jurisdiction is given to the Court by this section to order officers of a body corporate to answer interrogatories in an action to which that body corporate is a party. It is clear that the person ordered by the Court to answer must be an officer of the body corporate at the time of the making of the order, otherwise this Court has no jurisdiction. No doubt, very

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difficult questions might arise as to how the Court ought to exercise its discretion in compelling officers of a corporation to answer any particular interrogatories. Whether such officers should be asked any particular question or not must be decided by the Court in the exercise of its discretion, taking all the surrounding circumstances into consideration. The jurisdiction of the Court, however, is founded on the mere fact that the persons interrogated are officers of the body corporate at the time the order to answer the interrogatories is made. This action is brought in the name of the Madrid Bank. That company is the plaintiff on the record. An order has been made to wind up the company, and consequently all interest in and control over the proceedings are vested in the official liquidator. The official liquidator is, to all intents and purposes, the plaintiff, although not on the record. He is in the position of an assignee of a chose in action, who is suing in the name of the assignor. To require the directors to answer these interrogatories would not cause any hardship to those gentlemen, as they might apply to the Court if the interrogatories were vexatious, and the Court would grant them any relief that might be proper. In this case, the directors have never objected to the interrogatories themselves, but have refused to answer altogether. If at the time the order was made they were not officers of the Madrid Bank, no doubt they would not be bound to answer. But these gentlemen were directors at the time the order for winding up the company was made, and I see nothing in the Companies Act which made them then cease to be directors. I quite concede they had no control over the affairs of the company after the winding-up commenced, but that does not prevent their continuing to be officers of the company. The fact that the directors have no control or management over the books, &c., and management of the company after the winding-up commenced, might be very important in considering how the discretion of the Court should be exercised, but it does not touch the question of jurisdiction.

As to the second point of objection, viz. that the application should be by the person who obtained the order, and not by the official liquidator, I think the application may be properly made by the official liquidator, who is the person beneficially interested in this action, and who is in the position of a cestui que trust, who sues in the name of

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a trustee. He comes to the Court and says, in effect, he is the only person injured by the refusal of the directors to answer. An attachment is, in form, a punishment by the Court for disobedience of its orders, and is generally granted to assist those who are entitled to set in motion the process of the Court. As the official liquidator is really interested in this proceeding, he may properly claim this process of the Court. There is no fear that the Court would listen to a mere volunteer, who had no interest in the matter.

SHEE, J., concurred.

Rule absolute.

Attorneys for official liquidator: *Treherne & Wolferstan.*
Attorneys for directors: *Flux & Argles.*

REYNOLDS *v.* BOWLEY AND ANOTHER.

Nov. 16.

Bankrupt—Bankrupt Law Consolidation Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 125—*Goods in Order and Disposition of Bankrupt—Reputed Owner—Joint-tenants—Partners.*

Where one partner allows the other to carry on the business ostensibly as his own, on the bankruptcy of the latter the share of the dormant partner in the partnership stock in trade may be dealt with under s. 125 of 12 & 13 Vict. c. 106, as in the possession, order, or disposition of the bankrupt, as reputed owner, with the consent of the true owner.

So held on the authority of decided cases; but, quære by the Court, whether the cases were rightly decided.

CASE stated without pleadings.

The plaintiff is the sister of T. H. Reynolds, of the Marsh Farm, in the county of Wilts, cowkeeper, who was adjudged bankrupt on the 9th December, 1864. The defendants are the creditors' assignees.

In April, 1861, J. Reynolds, the father of the bankrupt and of the plaintiff, who then occupied the Marsh Farm, a dairy farm, near Swindon, and carried on the business of a cowkeeper, gave up possession of the farm to the bankrupt and the plaintiff, and sold the stock on the farm to them at a valuation for 650*l.*, which was paid for by them in equal shares.

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Upon the completion of the purchase of the stock, the bankrupt and the plaintiff entered into a written agreement to carry on the business in partnership with an equal share of the profits; they further agreed to take the Marsh Farm on a fourteen years lease, and in case of the death of T. H. Reynolds, Eliza Reynolds to retain her interest or share in the lease. Eliza Reynolds also agreed to be a sleeping partner, the business to be conducted and carried on in the name of T. H. Reynolds.

In pursuance of the agreement, both the bankrupt and the plaintiff continued from its date to reside upon the farm, and carried on the business of cowkeepers, until November, 1864. A lease of the farm for fourteen years was granted to the bankrupt alone on the 6th of July, 1861. The plaintiff and the bankrupt both resided in the farm house, and the business was carried on according to the terms of the agreement, and the bankrupt bought and sold the stock from time to time for the benefit of himself and the plaintiff. The household and farm expenses were paid out of the profits. A partnership account was kept between the bankrupt and the plaintiff, at the commencement of which was entered a copy of the agreement. They had no joint banking account. The bankrupt had a separate banking account, but it was a private banking account of the bankrupt, and had no direct reference to the farm or stock or profits or expenses thereof. The bankrupt alone, during the time he and the plaintiff resided on the farm, was rated to the relief of the poor, and all receipts for rates and taxes were given in the bankrupt's name; and the plaintiff's name never appeared in the business, save in the partnership book before mentioned. All business transactions were conducted solely in the bankrupt's name; and all debts in respect of the farming business were contracted solely in his name; and all sales and purchases were made in his name only. All this was done with the plaintiff's consent and permission, and the plaintiff did not interfere in any way in the management of the business, or in any sales or purchases; but the plaintiff, who resided with the bankrupt, devoted her whole time and labour in assisting him in the management of their joint business, in which, although known to the plaintiff's relations and friends and to some of the tradesmen of Swindon, it was not generally known that the plaintiff was a

partner. The plaintiff and the bankrupt were in the habit of drawing equally on account of their shares of the profits, and the moneys so drawn by them were entered in the partnership book of account, headed or entitled as the Marsh Farm account, as also the rent paid to the landlord, and all payments for rates and taxes, and all sums of money or bills paid by the plaintiff and the bankrupt to the different tradesmen for goods supplied to them; the amounts or respective moieties of each of them, the plaintiff and bankrupt respectively, in discharge of such bills, being set out separately in such book of account.

On the 16th of November, 1864, the bankrupt, being embarrassed on account of bills accepted by him for a brother, absconded, and then committed an act of bankruptcy, of which the plaintiff then had notice. The plaintiff remained in the farm house, and continued to sell the milk and other produce of the farm until the seizure hereafter mentioned.

On the 9th of December, 1864, T. H. Reynolds was adjudicated bankrupt upon the act of bankruptcy aforesaid, and the defendants were appointed creditors' assignees. The messenger of the court, under the usual warrant, on the same day took possession of the stock upon the farm on behalf of the assignees. On the 10th of December notice was given to the assignees that the plaintiff claimed an interest in the stock.

In January, 1865, the defendants, under an order of the Court of Bankruptcy, sold the whole of the proceeds. The stock so seized and sold was either stock which had been purchased from J. Reynolds, or which had been purchased with money arising from the sale of the stock so purchased from J. Reynolds, or out of the profits made by carrying on the business.

The question for the Court was, whether the plaintiff was entitled to one half of the proceeds of the sale. (1)

Macnamara, for the plaintiff. Section 125 of 12 & 13 Vict. c. 106, enacts that "if any bankrupt at the time he becomes bank-

(1) The Court were to draw any inferences of fact they thought proper; and counsel on each side argued the question of fact, whether the plaintiff had allowed her brother to appear as the apparent sole owner of the business; in the course of the argument for the defendants, the Court intimated that there could not be any doubt that she had.

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rupt, shall by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." The question is, does this section apply to a dormant partner? *Coldwell* v. *Gregory* (1) is a direct authority for the plaintiff that it does not. *Ex parte Enderby* (2), *Smith* v. *Watson* (3), *Ex parte Chuck* (4), are at first sight authorities for the defendants, but they can be distinguished. In *Ex parte Enderby* (2), the partnership had been dissolved; in *Ex parte Chuck* (4), the firm had been adjudged bankrupts; and in *Smith* v. *Watson* (3), there was no partnership, and therefore no joint interest in the goods claimed by the assignees. The modern decisions have restricted the operation of the section, and the usages of trade have been considered in applying it, so that clocks belonging to a customer at a clockmaker's, *Hamilton* v. *Bell* (5), books at a bookseller's, *Whitfield* v. *Brand* (6), are instances not within the enactment. There must be a real owner distinct from an apparent owner, and the real owner must consent to the apparent ownership: *Load* v. *Green* (7); *Belcher* v. *Bellamy* (8); here the bankrupt is both the true owner and the reputed owner. Lord Redesdale, in *Joy* v. *Campbell* (9), in commenting on the words of 11 & 12 Geo. 3, c. 8, s. 9, which are similar to those of the present enactment, says: "In his order and disposition with consent of the true owner, that means where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits unconscientiously, as the act supposes, to have such order and disposition." To the same effect is the judgment of Pollock, C.B., in *Hamilton* v. *Bell.* (10) There is nothing unconscientious or improper in a dormant partner allowing the partnership property to remain in the hands of the active partner. The bankrupt was merely a trustee of the moiety of the goods for

(1) 1 Price, 119.
(2) 2 B. & C. 389.
(3) 2 B. & C. 401.
(4) 8 Bing. 469.
(5) 10 Ex. 545. 10 Jur 1109
(6) 16 M. & W. 282.
(7) 15 M. & W. 216.
(8) 2 Ex. 303.
(9) 1 Sch. & Lef. at p. 336.
(10) 10 Ex. at p. 551. 10 Jur 1109

the plaintiff, and goods in the possession of a trustee on his bankruptcy are not within the enactment: *Earl of Shaftesbury* v. *Russell* (1), per Bayley, J.: *Winch* v. *Keeley*. (2) In Doria and Macrae's Practice of Bankruptcy, p. 411, it is said: "There is no reputed ownership in regard to a dormant partner."

H. James, for the defendants. No doubt *Coldwell* v. *Gregory* (3) is an authority in favour of the plaintiff, but that case was questioned in *Ex parte Dyster* (4) by Lord Eldon, and expressly overruled, in *Ex parte Enderby* (5), *Smith* v. *Watson* (6), and *Ex parte Chuck*. (7) Two things must concur before the statute can operate to pass the goods to the assignees. They must be in the possession of a bankrupt, and in his possession as reputed owner: here those two things concur. The bankrupt has by the act of the plaintiff been allowed to obtain credit by his appearing to be sole owner of the partnership goods. Lord Redesdale in his judgment in *Joy* v. *Campbell* (8), only meant that where a person leaves his goods in the possession of another who is bankrupt, the statute draws the inference that the act was unconscientiously done. In *Cooper* v. *Slade* (9) the question was as to the meaning of the word corruptly in the Corrupt Practices Act, 1854. (10) Willes, J., says: "I think the word corruptly in this statute does not mean dishonestly, but in purposely doing an act which the law forbids as tending to corrupt voters." So here where goods are left in the possession of a reputed owner by consent of the true owner the law infers it was done unconscientiously, and it is unnecessary to shew as a matter of fact that there was any dishonest or fraudulent motive, and such a question is never left to the jury.

Macnamara was heard in reply.

COCKBURN, C.J. I think that upon the authorities our judgment must be for the defendants. I feel that this is a case of very great difficulty. There is a great deal to be urged, not only in the way of argument, but also in the way of authority on both sides. On the one hand it may be said that it is a case of great hardship

(1) 1 B. & C. at p. 672.
(2) 1 T. R. 619.
(3) 1 Price, 119.
(4) 2 Rose, 256.
(5) 2 B. & C. 389.
(6) 2 B. & C. 401.
(7) 8 Bing. 469.
(8) 1 Sch. & Lef. at p. 336.
(9) 6 H. L. C. 746, 773.
(10) 17 & 18 Vict. c. 102.

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if the goods of a dormant partner, which may be required for the discharge of partnership debts, are to be available for distribution among the creditors of the other partner in the event of his separate bankruptcy. On the other hand it may be contended that the intention of the statute was to prevent a man from acquiring false credit by the apparent and ostensible possession of property, which, in point of fact, either wholly or partially, is not his. Whether that arises from a contract between the ostensible and the dormant partner, or whether it arises from some other circumstances unconnected with the partnership, it comes, I apprehend, equally within the mischief against which the statute was intended to be directed. I feel that there is a great deal to be said on either side, and the question is one with respect to which, if free from authority, I should require time to consider; but I think there are authorities in favour of the defendants which are binding on us.

The first case in which the question arose is the case of *Coldwell* v. *Gregory* (1), in which the Court of Exchequer held that under circumstances precisely similar to the present, the goods left in the possession of an ostensible partner, in which the dormant partner was jointly interested, were not in the possession of the bankrupt as reputed owner with the consent of the true owner, so as to be within the provisions of the then Bankrupt Act. (2) That decision, however, did not find favour with the great authority in these matters, Lord Eldon, who evidently entertained serious doubts as to its propriety in *Ex parte Dyster* (3), and the result of those doubts appears to have been that a case was sent to this Court for its opinion. That case was *Ex parte Enderby* (4), and it was pointed out by the counsel for the plaintiff, Mr. Parke, afterwards Parke, B. and Lord Wensleydale, that the case in the Exchequer—*Coldwell* v. *Gregory* (1)—was directly in point, and that the Court could not decide in favour of the assignees without overruling that case. Nevertheless, this Court after an elaborate argument did decide that the partnership property was in the possession of the bankrupt as reputed owner, with the consent of the true owner, so as to be within the Bankrupt Act. In

(1) 1 Price, 119.
(2) 21 Jac. 1, c. 19, s. 11.
(3) 2 Rose, 256.
(4) 2 B. & C. 389.

the case of *Smith* v. *Watson* (1), the attention of the Court being directed to the case of *Coldwell* v. *Gregory* (2), Bayley, J., says: "That case was considered by this Court in *Ex parte Gilpin* (3), and we certified that a secret partner was within the statute;" and Best, J., says: "I could not have signed the certificate sent in that case, unless I had satisfied myself that the decision in *Coldwell* v. *Gregory* (2) cannot be supported." I think, therefore, it is quite clear that this Court did intentionally overrule, by the report which it made in *Ex parte Enderby* (4), the decision in *Coldwell* v. *Gregory* (2), and that in the subsequent case of *Smith* v. *Watson* (1) the Court determined to abide by the opinion which they had already expressed. That being so, we must take it according to the decision of this Court that *Coldwell* v. *Gregory* (2) is not law; in other words, that property left by the secret partner in the possession of the ostensible partner is property within the statute, that is, property in the possession of the bankrupt as reputed owner with the consent of the true owner. Without, therefore, saying what would have been my own opinion if the matter had not been res judicata, I think we are bound by the decision of this Court expressly on the point, and that the authorities are conclusive. I hope, considering the importance of the question, that this case may be taken to the Court of Error.

MELLOR, J. I also feel we are bound by the decisions in this court, to which my Lord has referred, although I confess I think the tendency of modern decisions has been rather in the other direction; when I observe that the judgment of Lord Redesdale in *Joy* v. *Campbell* (5) is cited in several cases with entire approbation by Parke, B., and particularly in *Hamilton* v. *Bell* (6), in which case Pollock, C.B., and Alderson, B., concur with Parke, B., in thinking that Lord Redesdale's judgment expresses the true rule. If I had found that any of the decisions which have subsequently taken place in any of the other courts had been upon the precise state of circumstances of the present case, I should have felt at liberty to have followed the later decision, and to have held that

(1) 2 B. & C. at p. 406.
(2) 1 Price, 119.
(3) S. C. as *Ex parte Enderby*, 2 B. & C. 389.
(4) 2 B. & C. 389.
(5) 1 Sch. & Lef. 328, 336.
(6) 10 Ex. 545.

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the decisions in this court had been much shaken. But there is no such decision; therefore I think that we are bound to adopt the rule laid down in this court, and to hold, that in the case of a secret partner, the property, though belonging to the partnership, is yet in the order and disposition of the bankrupt, by consent of the true owner.

I confess I feel inclined to adopt the suggestion made by Mr. Macnamara, that, where the possession is a possession, not merely voluntary with regard to the true owner, but is a possession which the party in possession has a right to have in respect of his own interest in the goods, that is not a possession which was intended to be brought within the provisions of this penal clause; for it is penal so far as this, that it includes a person who improperly and unconscientiously,—in the sense of that expression, used by Lord Redesdale, in *Joy* v. *Campbell* (1), and approved by Parke, B., in *Hamilton v. Bell* (2),—and without any special reason but his own voluntary act, leaves goods in the possession of a trader. That cannot be said to be the case here, because the plaintiff was a partner with the bankrupt. The purchases were made jointly and entirely for the purpose of carrying on the partnership business, and were entirely consistent with the provisions of the partnership. However, as *Coldwell* v. *Gregory* (3) has been overruled by the two decisions in this court, I must give my judgment with the other members of the court in favour of the defendants.

SHEE, J. I have little to add to what has fallen from my Lord and my Brother Mellor; but I will briefly call attention to this fact, that that which this Court holds to be law in conformity with the decisions to which the Lord Chief Justice has referred—*Ex parte Enderby* (4) and *Smith* v. *Watson* (5)—has for some time been considered settled law in bankruptcy, for I find it laid down in the 3rd edition of Shelford on Bankruptcy, page 267, under the head of "Reputed Ownership" (and he cites those two cases as his authority for the position), "It appears to be settled, that in the case of a secret partnership, all the property and effects as

(1) 1 Sch. & Lef. at p. 336.
(2) 10 Ex. at pp. 548, 553.
(3) 1 Price, 119.
(4) 2 B. & C. 389.
(5) 2 B. & C. 401.

well as the debts due to the concern must be deemed to be in the order and disposition of the ostensible partner, and pass to his assignees."

LUSH, J. I have come to the same conclusion under pressure of the authorities in this court. If I had now to put a construction upon this clause for the first time, I should have thought that one of the necessary conditions in order to bring a case within it would be, that there should be a true owner of the goods as distinguished from the apparent owner, and such an owner as had the power to dissent from the possession of the apparent owner and to resume the possession of the goods himself; and that the clause could not apply to the case of a person, who held the goods in his own right, and who could not be deprived of the possession by the other non-apparent owner. The cases, however, I feel, are too strong for us to overrule in this court, and they have given a much wider interpretation to this clause. On that ground I come to the same conclusion as the rest of the Court.

Judgment for the defendants.

Attorney for plaintiff: *Crowdy.*
Attorneys for defendants: *Few & Co.*

DAUGLISH AND OTHERS *v.* TENNENT.

Nov. 20.

Debtor and Creditor—Composition Deed—Fraud.

Declaration on the money counts. Plea, that by a deed of arrangement made in pursuance of the law of New South Wales, and made between the defendant of the first part, certain trustees of the second part, and the creditors of the defendant named in a schedule to the deed of the third part, the defendant assigned all his estate to the trustees in trust for distribution equally among all his creditors; and that by the deed the parties of the ~~first and~~ second parts did, if and when the deed should have been executed by four fifths in number and value of the creditors, release the defendant from all demands, &c.; that the deed was executed by such majority, and amongst others by J. W. D., one of the plaintiffs; and that the defendant was released from all causes of action. The replication, on equitable grounds, averred that the plaintiff, J. W. D., executed the deed on the faith of the several provisions therein contained, but that it was never executed by any of the other plaintiffs; that the defendant agreed with certain of his creditors, being other than the plaintiffs, to pay or secure to such creditors, in consideration of

2 Ch 370
40 868
and third
15 Eq 233

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their executing the deed, certain pecuniary and valuable benefits and preferences over the others, and thereby induced such preferred creditors to execute the deed; and that such agreement was made, and such execution by the preferred creditors procured, without the knowledge or consent of the plaintiffs or of the creditors of the defendant other than the preferred creditors; and that the defendant procured the deed to be executed by such majority as in the plea mentioned by the fraudulent agreement:—

Held, on demurrer, that the deed was void against the plaintiffs, on the ground that, in order to make such a deed binding upon the creditors, there must be perfect good faith between all the creditors and the debtor, and no creditor be induced to sign the deed in consequence of receiving some benefit beyond the rest of the creditors.

DECLARATION on the money counts.

Plea, that by a deed made between the defendant therein described as of Melbourne, in the colony of Victoria, of the first part; the present plaintiff, William Henry Dauglish, of the same place, and Joshua Michael Joshua, of the same place (and in the indenture designated the trustees), of the second part; and the several persons and parties whose names and seals were subscribed and affixed in the schedule thereto written or thereunto annexed, being severally creditors in their own right, or being agents or attorneys of creditors absent from the said colony of the defendant, of the third part; after reciting that the defendant was indebted to the said several persons or parties whose names were set forth in the first schedule thereunder written in the several amounts or sums of money set in figures opposite to their respective names in such schedule, and that it had been agreed that the defendant should convey and assign all his real and personal properties and estates whatsoever unto the trustees upon trust for the benefit of all the creditors of the defendant under the provisions of an act of the governor and legislative council of the colony of New South Wales, made and passed in the fifth year of the Queen, numbered 9, entitled "An act for the further amendment of the law and for the better advancement of justice," and which act was then in force in the said colony, the defendant did assign to the trustees all his real and personal estate upon trust, to sell and dispose of the same and to stand possessed of the money upon trust "to apply the same towards payment of all the debts and sums of money owing by the defendant to the persons and parties whose names appeared as creditors in the first schedule thereto annexed, and to all other, if

any, of the creditors of the defendant, rateably and in proportion to the amount of the debts or sums of money due and owing to such creditors respectively, without any priority or preference, and in due course of administration of joint and separate estates," and after all such payments to pay over the residue to the defendant; and in consideration of the premises the parties of the second and third parts did, if and when the deed should have been executed by four fifths in number and value of the creditors of the defendant, pursuant to the act of council, release the defendant from all demands which the parties of the second and third parts had against him. The plea then averred that the deed was executed by four fifths in number and value of the creditors of the defendant; that at the time of the execution of the deed the defendant was resident and domiciled in the colony of Victoria, and that the causes of action accrued there.

The replication, on equitable grounds, after setting out the deed verbatim, the material parts of which are correctly stated in the plea, averred, that the plaintiff, J.W. Dauglish, executed the deed on the faith of the several provisions therein contained, but that it was never executed by any of the other plaintiffs, and that the defendant agreed with certain of the creditors of the defendant referred to in the plea, being other than the plaintiffs or any of them, to pay, give, or secure to such creditors, in consideration of their executing the deed, certain pecuniary and valuable benefits and preferences over the others of the creditors, and thereby induced such preferred creditors to execute the deed, which agreement was so made, and such execution by such preferred creditors procured, in manner aforesaid, without the knowledge, consent, or authority of the plaintiffs or of the creditors of the defendant other than the preferred creditors, and contrary to and in fraud of the deed and the plaintiffs and other unpreferred creditors and the laws of the colony; and the defendant procured the deed to be executed by such majority as in the plea mentioned, by and through the fraudulent agreement and premises in the replication aforesaid, whereby the deed by and according to the laws of the colony never released or discharged the defendant from the claim sued for in this action.

Demurrer and joinder.

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Quain, Q.C., in support of the demurrer. The replication is no answer to the plea. One of the plaintiffs has executed the deed; it may, therefore, be treated as an ordinary composition deed. Being so executed, it is binding upon the plaintiffs, unless the agreement which the defendant has made with one of his other creditors avoid the deed between all parties. Now, it is conceded that the agreement between the defendant and his other creditors is void, and if money had been paid under it, it could not be recovered back: *Wilson* v. *Ray*. (1) The contention on the other side will be, that not only is the agreement between the defendant and the preferred creditors void, but the deed itself is void as against all creditors. The preferred creditors are clearly bound, for they could not set up the corrupt agreement as they are parties to it; if the plaintiffs are not bound there will be this anomaly, that the deed will be binding on some creditors and not binding on others. The scheme of the deed is that the whole of the defendant's estate should be assigned to a trustee, to be distributed equally among all his creditors, share and share alike. It is not a composition deed; the plaintiffs are not looking forward to a fixed dividend; at the highest they stipulated that if the assets were equally distributed they would release the debtor. There is no allegation that the assets have been in any way diminished, or that the pecuniary benefits mentioned in the replication are to come out of the assets. How, then, can the arrangement to pay a sum to the preferred creditors prejudice the plaintiffs? If a stranger gave a creditor a sum of money to induce him to sign the deed, what ground could there be for saying that would avoid the deed? If it could be inferred from the facts stated in the replication that the plaintiffs would get a less share of the assets than the preferred creditors, it might perhaps be a fair ground in equity to set aside the deed. The replication is also bad, because it does not shew whether the plaintiffs or the preferred creditors first executed the deed, and it does not therefore appear that the plaintiffs executed on the faith that the preferred creditors or any of them would execute after them; no deception therefore has been practised on the plaintiffs, and for aught that appears the preferred creditors may not have been necessary to make up the four fifths. *Mallalieu* v. *Hodgson* (2) shews that the effect of such an

(1) 10 A. & E. 82. (2) 16 Q. B. 689; 20 L. J. (Q.B.) 339.

agreement is merely to render the stipulation for a preference void as between the parties, and to deprive the preferred creditors of all advantage under the deed; but such an arrangement does not render it void as against the other creditors.

Sir G. Honyman, Q.C. (*Murphy* with him), for the plaintiffs. The condition on which the plaintiffs executed the deed, and agreed to be bound by it, was, that four fifths of the other creditors should also bonâ fide execute it. The replication shews that that condition has not been complied with; the deed is therefore void. The principle on which a composition deed is held to be binding on the creditors is, that they "bargain for an equality of benefit as to payment and security; there is a tacit understanding that all shall share alike, pari passu, and that it shall not be competent to one of them, without their knowledge, to stipulate for any additional benefit or security to himself:" Chitty on Contracts, 5th ed. 594. Apply that principle here, and the deed is void. The secret bargain is a fraud on all the creditors: *Higgins* v. *Pitt.* (1) Under the old law, if a bankrupt's creditors were induced by the payment of money to sign his certificate, the certificate was void: *Robson* v. *Calze* (2); *Holland* v. *Palmer* (3); *Phillips* v. *Dicas.* (4) The present case is analogous. In *Heming* v. *Pugh* (5), it was decided that creditors to whom the debtor had given a preference were incapable of assenting to or executing a deed of arrangement under s. 192 of the Bankruptcy Act, 1861.

Quain, Q.C., replied.

COCKBURN, C.J. I am of opinion that our judgment ought to be for the plaintiffs. The defendant takes his stand on the composition deed which he has pleaded, to which there is a replication, alleging that certain pecuniary and valuable benefits and preferences beyond the amount of their composition were held out to certain creditors to induce them to execute the deed. To that replication there is no rejoinder that the plaintiffs were parties to any corrupt arrangement; and it must be taken that the plaintiffs were in utter ignorance of the arrangement. In order that such a deed should be binding on the creditors, it is essential that

(1) 4 Ex. 312, 324. (2) 1 Doug. 228. (3) 1 B. & P. 95.
(4) 15 East, 248. (5) 1 New Rep. 239.

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there should be the most perfect good faith between the debtor and all his creditors. It is very true that it does not appear that the preference is to be obtained from the assets, or that all the creditors will not receive an equal distribution of the assets; but it is a wrong ground to rest the validity of a composition deed upon, to say that the creditor looks only to the equal distribution of assets. There may be cases in which a man might not be capable of deciding for himself whether he would accept the composition, and would rather trust to the judgment of a body of creditors than to his own, whether it was advisable for him to execute the deed; and he is entitled by the agreement into which he enters to insist that the concurrence of the other creditors shall have been obtained by fair means; and if it were obtained by a promise from the debtor to give something more to some creditors than to others, the deed would be fraudulent and void, as between the debtor and the other creditors who were no parties to the arrangement. I think, therefore, that the present deed is void.

MELLOR, J. I am of the same opinion. This is a deed of arrangement voluntarily made between the debtor and certain creditors, the effect of which is said to be to release the debtor from his debts. To put the case on a broad ground, it is an agreement between the debtor and each creditor that they are contracting on terms of equality as to each and all, and if by a secret bargain some creditors have an advantage over other creditors, it is a fraud upon those who must be presumed to have signed the deed upon the understanding that all the creditors should be placed on the same footing.

LUSH, J. I am of the same opinion. It must be taken that every creditor who signed the deed stipulated for good faith between the debtor and the whole of the creditors, and that the release was only to take effect if and when the requisite majority of the creditors should have bonâ fide executed the deed; and if the execution of some was obtained by bribery, then it is not such an execution of the deed as was contemplated. The pleadings do not shew whether more than four fifths executed the deed, but if it were so, and if there is anything in the defendant's point,

it lay on him to shew that the requisite number did bonâ fide execute.

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Judgment for the plaintiffs.

Attorneys for plaintiffs: *G. S. & H. Brandon.*
Attorneys for defendant: *Elsdale & Byrne.*

THE QUEEN *v.* BLIZARD.

Nov. 24.

Quo Warranto—Void Election—Resignation of Office—Disclaimer—Practice—Costs.

The Court will make a rule for a quo warranto information absolute, although the defendant has resigned the office and his resignation has been accepted before the rule was obtained, where the object of the relator is, not only to cause the defendant to vacate the office, but to substitute another candidate at once in the office; as in such a case the relator is entitled to have judgment of ouster or a disclaimer entered on the record.

In making the rule absolute, the Court will exercise a discretion as to costs.

Post 560
3 Q B 632, 3-4

THIS was a rule for an information in the nature of a quo warranto, calling on the defendant to shew by what authority he claimed to be a councillor of the borough of Tewkesbury, on the ground that, being mayor of the borough and the returning officer who presided at the election, he was not eligible as a candidate for the office of councillor at the election on November 1st, 1866, and that he was not duly elected, and his election was void.

It appeared from the affidavits that the defendant was mayor, and continued in office as mayor till the 9th of November; that he, with three other councillors, went out of office on the 1st of November, and offered himself for re-election; that the relator, who was duly qualified, was also a candidate; that the defendant, as mayor, the borough not being divided into wards, presided at the election. At the opening of the poll on the 1st of November, the relator served a notice upon the defendant and the assessors, which stated, that the defendant being mayor of the borough was disqualified for the office of councillor, and ineligible to be nominated or elected a councillor during the term of his mayoralty, and that all votes given to him would be thrown away, and that the assessors were not to receive or record any votes tendered for the defendant.

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This notice was also served on the burgesses and published in the borough. At the close of the poll, there being four vacancies and only five candidates, including the defendant, the relator, who was the last on the poll, claimed to be elected, and required his name to be returned in the list of persons elected as councillors.

The name of the defendant, however, was returned, and on the 5th of November, the defendant made and subscribed before two councillors the declaration as councillor contained in s. 50 of 5 & 6 Wm. 4, c. 76.

On the 9th of November the defendant, who swore that he was misled by the notice, and did not understand that the ground of his being disqualified was his being returning officer, attended the meeting of the council, and resigned his office as councillor, and paid the fine imposed by the bye-law on persons vacating office, and his resignation was accepted. On the 12th of November the present rule for the quo warranto was obtained.

Powell, Q.C., shewed cause. The defendant had resigned the office before the rule was moved for. The office is void, and the quo warranto will not lie.

The Court then called upon

W. H. Cooke, Q.C., and *Dowdeswell*, to support the rule. The relator claims the office; a resignation of the office is therefore not sufficient. The relator is entitled to have a disclaimer entered upon the record, for without a disclaimer the Court would not grant a mandamus to admit the rightful candidate. It is true that the defendant has resigned, but there is a great difference between a disclaimer and a resignation of an office; resignation implies that the defendant has been rightly elected. In the one case the relator would be entitled to a mandamus to be put into the office, in the other the mandamus would be for a new election. *Rex* v. *Warlow* (1), *Reg.* v. *Morton* (2), *Reg.* v. *Hartley* (3), *Reg.* v. *Sidney* (4), are authorities for this position.

[LUSH, J. In all those cases the resignation was after the rule for a quo warranto had been obtained.]

That is immaterial; the principle is the same.

(1) 2 M. & S. 75.
(2) 4 Q. B. 146.
(3) 3 E. & B. 143.
(4) 2 L. M. & P. 149.

Powell, Q.C., in reply. The defendant was misled by the form of the relator's notice; he resigned as soon as ever the true objection was discovered. The relator, therefore, is to blame, and even if he is entitled to have the rule absolute, the Court will give him no costs.

COCKBURN, C.J. I own that at first I entertained a strong impression that this rule was unnecessary, and that it ought to be discharged; but I am bound to admit that Mr. Dowdeswell's argument has convinced me that my first impression was wrong, and that the rule ought to be made absolute. I am far from saying that if a man elected and admitted to an office discovers that, for want of qualification, or for any other sufficient reason, he is not entitled to hold the office, and resigns it, a proceeding by quo warranto would be necessary in order to vacate the office, and so make way for a fresh election.

In the cases, which have been cited, and in which it has been held that a quo warranto was necessary notwithstanding the resignation of the person against whom the proceeding was directed, the resignation had taken place after the rule nisi had been obtained. I do not, therefore, proceed on the authority of those cases. Here we have something more than a proceeding for the mere purpose of ousting the party from the office which he has been holding. If the purpose of these proceedings were merely to vacate the office, so that a fresh election might take place, it is obvious that the resignation of the office would effect that purpose just as well as the removal of the person from the office by quo warranto. In this case, however, the relator not only denies the validity of the defendant's election, but he claims to have been himself elected into the office. The relator says, "Notice was given of the disqualification of the defendant; the votes therefore given in his favour were thrown away, and must be treated as though they had not been given, and the effect is to place me in a majority, and entitle me to be elected."

Now in order to enable the relator to take that position, it must necessarily be assumed that there never was any election of the defendant. I agree with Mr. Dowdeswell in his proposition, that a resignation implies that the person resigning has been elected into

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the office which he resigns. A man cannot resign that which he is not entitled to, and which he has no right to occupy. To accept his resignation, therefore, on the part of the corporate body, is to assume that he has been properly elected; and to refuse this rule, treating the resignation as sufficient for the purpose of the case, would be to deprive the relator of the advantage which upon the information he would have, either of ousting the defendant if the proceedings are carried to their ultimate result, or of having it admitted on the record by the defendant, not only that he has no present right to the office, but that he never had any. The effect of a resignation would be simply to send the parties to a new election, while the effect of a disclaimer or judgment for the crown upon the final issue of the quo warranto would be to displace the defendant from the first, leaving it open—which otherwise it would not be—to the relator to claim the office to which he says he has been elected, and if he can establish that claim upon a mandamus, to be admitted into the office. I think, therefore, Mr. Dowdeswell is right in his contention that it was necessary, in order to do justice between these parties, that these proceedings should have been resorted to, therefore this rule must be made absolute.

Then comes the question whether the Court shall give the relator his costs. I cannot but conceive that there is considerable doubt as to the ultimate result of these proceedings, and I cannot also but see that to a certain degree the defendant has been placed in a false position by the act of the relator. I think the form in which the notice was given to the electors of the disqualification of the defendant was, to say the least, ambiguous. If the true nature of the disqualification had been pointed out in the first instance, the probability is the defendant would have been immediately advised Pow 560 that he could not exercise the functions of returning officer and also at the same time offer himself as a candidate, and he would have withdrawn from that position, or at all events he would not have taken upon himself to be admitted and sworn into the office which for some days he filled. For this reason, and also because it is doubtful whether the notice was a sufficient notice of the defendant's disqualification, so as to cause the votes given to him to have been thrown away, I think we need not go so far as to grant costs. I think that, on the defendant's undertaking to enter a disclaimer,

he ought not to be called upon to pay the costs of the rule. The relator will be entitled to the costs of the information and the disclaimer; but we do not give him the costs of this rule.

MELLOR, J., concurred.

LUSH, J. I entirely concur with the judgment of the Lord Chief Justice. I was at first under a strong impression that the rule was useless, and had that been the case I should have concurred in discharging it with costs; but I am convinced by the argument of Mr. Dowdeswell that as the relator claims and intends to claim to be seated himself, he is entitled either to try the validity of the defendant's election in a quo warranto, or have the defendant's avowal upon the record that the election was invalid; but for the reasons given by my Lord, I think there ought to be no costs upon the rule.

PER CURIAM. Rule absolute; the relator to have the costs of the information, but not the costs of the rule, if the defendant enter a disclaimer.

Rule absolute accordingly.

Attorney for relator: *Norcutt.*

Attorney for defendant: *Brown, Tewkesbury.*

HUBBERSTY *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Nov. 27.

Company—Transfer of Shares, Registration of—Calls unpaid—Companies Clauses Consolidation Act (8 *Vict. c.* 16), *s.* 16.

94 RD 437 438.

Section 16 of 8 Vict. c. 16, enacts that no shareholder shall be entitled to transfer any share, after any call has been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him:—

Held, that the section only applies to the transfer of shares on which a call can be and has been made, and has no application to the transfer of shares on which all the calls have been paid; and a company, therefore, is bound to register a transfer of stock, although the transferror be the holder of shares on which there are calls unpaid.

Affd 4 E. & C. 1 vol. 471

SPECIAL CASE without pleadings.

In 1845 John Hubbersty became the holder of 133 25*l.* shares in the Sheffield and Lincolnshire Railway Company, and subsequently

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paid calls amounting to 12*l.* 10*s.* on each share. In 1846 the Sheffield and Lincolnshire Railway Company was amalgamated with other companies under the name of the Manchester, Sheffield and Lincolnshire Railway Company. In 1847 John Hubbersty had allotted to him in respect of the 133 25*l.* shares, 66 10*l.* new shares in the company which were entitled to a preferential dividend of 6 per cent. These shares have been fully paid up. During the years 1848 and 1849 five calls were made on the 133 25*l.* shares, amounting to 12*l.* 10*s.* on each share. These calls have not been paid. While the first and second calls were unpaid, John Hubbersty sold 20 of the 66 10*l.* shares, and the transfer to the purchaser was registered in the books of the company. The remaining 46 10*l.* shares were on the 26th of January, 1856, converted into stock, and are now represented by 460*l.* of the company's 6 per cent. preference stock. No dividend on the 460*l.* stock was ever paid to John Hubbersty. On the 24th May, 1856, John Hubbersty sold to the plaintiff 460*l.* of the 6 per cent. preference stock so held by him. The deed of transfer was executed by John Hubbersty in compliance with the provisions of the 8 Vict. c. 16 (The Companies Clauses Act, 1845), and was tendered to the secretary of the company for registration under section 15. The company, however, relying on section 16, refused to register the transfer, on the ground that John Hubbersty had not paid the calls due on the original 25*l.* shares held by him.

The question for the opinion of the Court was, whether the plaintiff was entitled to have the transfer registered.

Mellish, Q.C. (*Quain, Q.C.*, with him), for the plaintiff. The question is, whether the defendants can refuse to register a transfer of stock because the owner of the stock is also the owner of shares on which calls have been made which he has not paid. This question depends on the construction of section 16 of the 8 Vict. c. 16. Section 14 distinguishes between shares and stock, it provides that a shareholder may sell and transfer his shares or his stock in the undertaking: section 15 provides for the registration of the transfers: and then comes the section 16, which enacts that "no shareholder shall be entitled to transfer any shares, after any call shall have been made in respect thereof, until he shall have paid such call,

nor until he shall have paid all calls for the time being due on every share held by him." The first part of the section can only apply to shares on which a call has been made; it cannot apply to stock, because it is clear that no call can be made on stock; and if the first part only applies to shares on which a call is made and does not apply to stock, the second part cannot apply to stock, because it can only apply to the same subject matter as the first part. It might be contended that the section does not apply to two different descriptions of shares. It is unnecessary to go so far, as the section cannot apply to shares which are fully paid up. It will be contended on the other side that section 16 is incorporated with section 62 (1), and reliance will be placed on the words in that section, the holders of stock may transfer their interest "in the same manner and subject to the same regulations and provisions as or according to which any shares in the capital of the company might be transferred under the provisions of this or the special act." Those words do not incorporate section 16; what is meant by them is that the transfer and transmission of stock shall be conducted with the same formalities as the transfer and transmission of shares.

Manisty, Q.C. (*J. A. Russell* with him), for the defendants. The object of the enactment was that if a shareholder was indebted to a company for calls due in respect of shares held by him, the company should have a security on every share the shareholder held; and the true construction of section 16 is that after a call is made a shareholder shall not transfer any share until he has paid all calls due on every share held by him. It may be that section 16 does not by itself apply to stock, but the whole group of sections, from 14 to 20, are incorporated with section 62. That section provides that after shares have been converted into stock they may be transferred in the

(1) 8 Vict. c. 16, s. 62: "After such conversion or consolidation shall have taken place, all the provisions contained in this or the special act which require or imply that the capital of the company shall be divided into shares of any fixed amount and distinguished by numbers, shall, as to so much of the capital as shall have been so converted or consolidated into stock, cease and be of no effect, and the several holders of such stock may thenceforth transfer their respective interest therein, or any parts of such interests, in the same manner and subject to the same regulations and provisions as or according to which any shares in the capital of the company might be transferred under the provisions of this or the special act. . . ."

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same manner and subject to the same regulations and provisions as shares. These regulations and provisions are to be found in sections 14 to 20. Section 16 is a restriction on the transfer of shares until all calls due on every share is paid, and being incorporated with section 62 is a restriction in the same manner on the transfer of stock.

Mellish, Q.C., was heard in reply.

MELLOR, J. I am of opinion that the transfer ought to be registered. The true meaning of the sections to which our attention has been called is that contended for by Mr. Mellish. I think section 16 does not restrict the transfer of shares, the amount of which is paid up, and therefore it does not restrict the transfer of consolidated stock. Section 16 enacts that "no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof until he shall have paid such call," that is, the call made in respect thereof; "nor until he shall have paid all calls for the time being due on every share held by him." The literal meaning of these words seems to me to be that where a call is made on a shareholder in respect of certain shares, if he has other shares on which calls are in arrear he cannot transfer any shares until he shall have paid, not only the call made on the particular shares, but the calls in arrear on the other shares which he holds. It was contended, on behalf of the defendants, that it is the intention of the legislature that a company should retain, as a security for a call, all shares which a shareholder on whom a call is made may hold in the company, whether the amount of such shares be paid up or not. I can find no words which bear any such meaning or indicate any such intention. I think a shareholder must pay a call either made or in arrear before he can transfer his shares; but the company have no power given them by any section to hold paid up shares as a security for the amount of a call; they may bring their action against the shareholder for non-payment of the call, or they may forfeit his shares. I think it would be unreasonable to enlarge the words of section 16, and to impose a restriction on the transfer of consolidated shares, when every liability with respect to them has been discharged.

SHEE, J. I am of the same opinion. In this case it appears that the person who has transferred the preference stock to the plaintiff had not paid his calls upon the original shares held by him, and in respect of which the preference shares had been allotted; and it has been contended on behalf of the defendants, that under sections 16 and 62 the company are not bound to transfer the stock until the holder has paid up all his calls. If there be any ground for this contention it must rest on the words of section 62, which, after providing for the consolidation of shares, proceeds that the holders of stock when consolidated may thenceforth transfer their respective interest therein in the same manner, and subject to the same regulations and provisions as or according to which any shares in the capital of the company may be transferred under the provisions of this or the special act. It is contended that these words of the section incorporated the restrictions of section 16, and that, therefore, the holder of preference stock (in respect of which, from the mere fact of its being stock, it is clear that all calls have been paid) could not transfer that stock until he had also paid up his calls due on shares which have not been consolidated. But that is not the right construction of these sections. Section 16 is a restriction on section 14, which applies to the transfer of shares, and provides that any shareholder may sell and transfer his share if he conform to certain regulations pointed out in that section; and that section evidently, if taken in conjunction with section 16, relates to the transfer of shares in respect of which no calls are due. If section 62 is read with section 16, it is clear that shares converted into stock are put upon the same footing as shares in respect of which all calls have been paid. On the general words of section 14 a restriction is imposed by section 16, but that restriction evidently applies only to shares on which a call has been made, and has no reference to shares on which all calls have been paid, and consequently has no reference to the transfer of stock. If sections 14 and 62 are read together, then the words in section 62, to which I have already referred, apply merely to the formal provisions which regulate the transfer and authentication of shares. I think, therefore, that our judgment ought to be for the plaintiff, and the defendants must register the transfer.

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LUSH, J. The view I take of this case makes it unnecessary for me to express an opinion as to whether stock is or is not subject to the same restrictions as paid up shares, because I am of opinion that if the shares in this present case had not been converted into stock, still section 16 would not have prohibited the registration of the transfer. Section 16 is pointed entirely to shares clogged with a pending liability to calls. The subject of the prohibition is a share of that description. The section is, "no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call;" had the section stopped there, there could have been no doubt that those words could not have had any application to shares in respect of which no call had been made; then the second branch of the section cannot have any application except to cases within the first, "nor until he shall have paid all calls for the time being due on every share held by him;" both portions of the section apply to the same subject, a share in respect of which a call has been made. I am, therefore, of opinion, where a person holds shares of two classes, in one of which no call has been made, but a call has been made in respect of the other, he may transfer any or all of the shares in the first class without paying the calls due upon the second; and it is immaterial whether the calls in the first class have been fully paid up or not, because that case is not the subject of the enactment. But if a call is made the shareholder cannot part with any share of that class without paying that call and all calls which are in arrear in respect of shares of that class. I think we ought to be very careful not to strain the words of this enactment lest we restrict the negotiability of shares in companies.

Judgment for the plaintiff.

Attorneys for plaintiff: *Dubois & Maynard.*
Attorneys for defendants: *Cunliffe & Beaumont.*

[IN THE EXCHEQUER CHAMBER.]

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THE TYNE IMPROVEMENT COMMISSIONERS *v.* THE GENERAL STEAM NAVIGATION COMPANY.

Ship—Damage by Negligence of Pilot—Pilotage, when compulsory on British Ship—Port of Newcastle-upon-Tyne—41 *Geo.* 3, *c.* lxxxvi.—6 *Geo.* 4, *c.* 125, *ss.* 58, 59, 89—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 353, 388.

By a local act for the port of Newcastle-upon-Tyne, pilots are licensed for the port, and foreign ships are obliged to employ a licensed pilot in the port, with a proviso that nothing in the act shall extend to oblige owners or masters of British ships to employ a pilot if not desirous so to do. By 6 Geo. 4, c. 125, ss. 58, 59, every master of any ship, with certain exceptions, is subject to a penalty if he pilot his vessel himself or by any other than a pilot licensed and qualified for the district in which the ship may be. By s. 89, "nothing in this act shall extend . . . to alter or repeal any provisions in any act relating to the pilots of any ports in relation to which particular provision shall have been made in any act as to pilots or pilotage, or to the pilotage within the limits prescribed by any act relating to pilotage for such ports :"—

Held, that, assuming s. 58 would otherwise have made it compulsory on a British vessel to employ a licensed pilot in the Tyne, the case was within s. 89, and therefore it was not compulsory by law on a British ship to employ a licensed pilot in the Tyne at the time the 17 & 18 Vict. c. 104 came into operation; and consequently the owner is not protected by s. 388 from liability for damage occasioned by the fault of a qualified pilot in charge of the ship.

Dodds v. *Embleton* (9 D. & R. 27) affirmed.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the defendants.

The declaration charged, that the plaintiffs were possessed of a dredger, and the defendants were possessed of a screw steam-vessel, of which the defendants had the management by their servants and mariners, and the dredger and the steam-vessel being afloat on the river Tyne, the defendants took such bad and improper care of their steam-vessel, and navigated and directed and managed the same, and managed the engines of the same, in so careless, negligent, and improper a manner that, by and through the carelessness, negligence, and mismanagement and improper conduct of the defendants by their servants and mariners, the steam-vessel ran foul of and struck against the dredger, whereby the dredger was greatly damaged.

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Pleas. First, not guilty. Second, that the defendants at the time when &c. were the owners of the screw steam-vessel, and that the loss and damage were occasioned by the fault or incapacity of a qualified pilot then acting in charge of the vessel, under and in pursuance of the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), within a district where the employment of such pilot was compulsory by law.

The plaintiffs took issue upon the pleas; and replied further, as to the second plea, that the steam-vessel at the time when &c. was a vessel as to which the employment of a pilot was not compulsory by law.

The cause was tried at the Northumberland spring assizes, 1864, by Willes, J., without a jury.

The following is the case, stated by the learned judge:

This was an action against the owners of a screw steamer for running into one of the plaintiffs' dredging boats.

There were two questions: one of fact, whether the accident happened by the actionable negligence of the defendants' servants. This I decided in favour of the plaintiffs.

The other question was upon a plea of the Merchant Shipping Act, whether the defendants were exempt from liability because of what was done having been done under the orders of a qualified pilot. This I reserved.

It depends, as I understand it, upon whether the vessel was of such a character as to have been bound (in a sense put upon that word by the authorities) to take a pilot.

I therefore only furnish so much of the evidence appearing upon my notes as touches that matter.

The defendants' steamer was a British sea-going vessel, usually trading between London and Tonning. She went upon the occasion in question in ballast to the Tyne, with a view to get a cargo thence to London. As she was going up the river, and before she had arrived at her berth, she cast anchor, swung up with the tide, which was flowing, and in doing so struck the bow of the dredger, which was going down the river. The casting anchor in order to swing round was not improper in itself, but it was wrong when done, because of the dredger, so unwieldy, being so near, that striking her in swinging was practically inevitable.

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The steamer was in charge of a qualified pilot duly licensed by the Trinity House of Newcastle, and what was done was done by his orders and under his control. The master and crew were not to blame, but the pilot, if anybody, for giving the orders.

I found for the plaintiffs, damages 588*l.*, subject to the opinion of the Court upon the question of exemption by reason of having a pilot on board under the statutes.

A rule was obtained accordingly to enter the verdict for the defendants, on the ground that the defendants were protected from liability by the fact of their vessel being at the time of the alleged negligence under the exclusive management of a duly authorized pilot.

The Court of Queen's Bench (June 14, 1864) discharged the rule, without hearing the argument, on the authority of *Dodds* v. *Embleton*. (1)

S. Temple, Q.C. (*T. Jones, Q.C.*, with him), for the defendants. The defendants' defence is founded on s. 388 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which exempts the owners of ships from liability for damage caused by the fault of a qualified pilot within a district where the employment of such pilot is compulsory; and the question is, whether it is compulsory on a British ship to employ a pilot in the port of Tyne. This depends on the construction to be put on the local act, 41 Geo. 3, c. lxxxvi. (2), under which pilots are licensed for the port of Tyne, and the 6 Geo. 4, c. 125; for although the latter act is repealed by

(1) 9 D. & R. 27.

(2) By 41 Geo. 3, c. lxxxvi., "An act for extending and enlarging the powers, and increasing the rates and duties of the corporation of the Trinity House of Newcastle-upon-Tyne, and for better regulating the port of Newcastle" (20th June, 1801), after reciting that the master, pilots, and seamen of the Trinity House of Newcastle had been for a long series of years a corporation with certain powers for regulating the port, and licensing pilots, and that the authority of an act of parliament was required to effect the object of regulating the port, &c., it is enacted: s. 1. "That it shall be lawful for the said master, pilots, and seamen, and they are hereby required to examine such persons as to them shall seem proper, to ascertain their skill, knowledge, and experience in navigating, piloting, and conducting ships and other vessels up and down the said river of Tyne, &c.; and after such examination made, and proper satisfaction had, as to the skill, &c., to license all or any of the said persons so examined and found qualified to act in the capacity of pilots as aforesaid; and pilots so licensed shall at all times exclusively (where any pilot shall be

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the 17 & 18 Vict. c. 120, yet, inasmuch as the 17 & 18 Vict. c. 104, s. 353, enacts that the employment of pilots shall continue

employed) have the piloting of ships or vessels up and down the said river," &c.

s. 6. "That the owners or masters of any foreign ships or vessels resorting to, or coming into, or departing from the said port of Newcastle, or any of the creeks or members belonging thereto, shall, and they are hereby obliged and required respectively to receive, take on board, and employ, in the piloting such their ships or vessels, such pilots to be licensed as aforesaid; and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally, nevertheless, answer and pay to the said master, pilots, and seamen the aforesaid pilotage duties, and the same shall be recoverble in the same manner as if such pilots had been actually received and employed: provided always, that nothing in this act contained shall extend, or be construed to extend, to oblige or compel the owners or masters of any British ships or other vessels to employ or make use of any pilot or pilots in piloting or conducting such ships or vessels if they shall not respectively be aminded or desirous so to do."

The 6 Geo. 4, c. 125, after giving (ss. 2—5) authority to the Trinity House of Deptford Strond to examine and license pilots, enacts by s. 6: "That it shall be lawful for the corporation of the Trinity Houses of the ports of Hull and Newcastle respectively to appoint sub-commissioners of pilotage to examine pilots, and give licences for them to pilot ships and vessels into or out of any ports, harbours, or places within the limits of their respective jurisdictions; anything in this act contained to the contrary, notwithstanding: provided always, that such sub-commissioners as have been already appointed, either by the said corporation of Trinity House of Deptford Strond, or by the said corporations of the Trinity Houses of the ports of Hull and Newcastle respectively, under the authority of any act or acts of parliament heretofore passed, shall continue to act in the same manner as if they were appointed under this act."

s. 55. "No owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any persons whomsoever from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of such ship or vessel, under or in pursuance of any of the provisions of this act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel. . . . ."

s. 58. "Every master of any ship or vessel, who shall act himself as a pilot, or who shall employ or continue employed as a pilot any unlicensed person, or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any pilot licensed and qualified to act as such, within the limits in which such ship or vessel shall then actually be, shall have offered to take charge of such ship or vessel, or have made a signal for that purpose, shall forfeit for every such offence double the amount of the sum which would have been legally demandable for the pilotage of such ship or vessel, and shall likewise forfeit for every such offence an additional penalty of 5*l.* for every fifty tons burthen of such ship or vessel, if the corporation of Trinity House of Deptford Strond, as to cases in which pilots licensed by or under the

compulsory in districts where it was so when the act came into operation, it so far still remains in force. Now, s. 58 of 6 Geo. 4, c. 125, imposes a penalty on every master of any ship who pilots his vessel himself or by other than a pilot qualified for the district in which the ship may be, subject only to the exceptions mentioned in s. 59, within which the defendants' vessel does not fall; and the very nature of those exceptions shews that the port of Newcastle was intended to be included in the act; and, indeed, it is expressly mentioned in s. 6. It is clear, therefore, that if s. 58 stood alone, the employment of a licensed pilot would be compulsory on a British vessel navigating the Tyne. But the plaintiffs will rely on

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said corporation shall be concerned, or the said lord warden for the time being, or his lieutenant for the time being, as to cases in which the Cinque Port pilots shall be concerned, shall think it proper that the person prosecuting should be at liberty to proceed for the recovery of such additional penalty, and certify the same in writing."

s. 59 allows the master in certain cases to pilot his own vessel.

By s. 89, "Nothing in this act contained shall extend or be construed to extend to the taking away, abridging, defeating, impeaching, or interrupting of any grants, liberties, franchises, or privileges heretofore granted by any charters or acts of parliament to the pilots of the Trinity House of the town of Kingston-upon-Hull, or the Trinity House of Newcastle-upon-Tyne, or to give any authority to the corporation of the Trinity House of Deptford Strond, within any ports or districts having separate jurisdictions in matters of pilotage under any act of parliament or charter, or to alter or repeal any provisions contained in any act or acts of parliament relating to the pilots of any ports or districts in relation to which particular provision shall have been made in any act or acts of parliament as to the pilots or pilotage, or to the pilotage within the limits prescribed by any act or acts of parliament relating to pilotage for such ports, or to the burthen of vessels navigating to or from such ports."

The 6 Geo. 4, c. 125, is totally repealed by the Merchant Shipping Repeal Act, 1854, 17 & 18 Vict. c. 120, s. 4 and sch.; but the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 353, enacts "subject to any alteration to be made by any pilotage authority, in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force;" and the section imposes penalties on every master of any unexempted ship navigating within any such district without a qualified pilot.

s. 388. "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

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the local act, coupled with s. 89 of 6 Geo. 4, c. 125; and it is on this point that the case of *Dodds* v. *Embleton* (1) appears to have proceeded, and that decision the Court of Queen's Bench held binding upon them. In that case it appears to have been held that the owner of a British vessel having on board a pilot licensed under 41 Geo. 3, c. lxxxvi., was not within the protection of s. 55 of 6 Geo. 4, c. 125. The Court has now to say whether or not that case was rightly decided. The defendants contend that it was not. When the 41 Geo. 3, c. lxxxvi., was passed, pilotage was not compulsory in the Tyne either by statute or common law; and s. 6 of the local act, while it enacts that the owner of a foreign vessel navigating the Tyne shall employ a licensed pilot, does not by its proviso enact that it shall not be compulsory on a British vessel to take a pilot, but simply takes British vessels out of the operation of the act, and leaves them as if the act had not been passed. So that s. 58 of 6 Geo. 4, c. 125, when it makes the employment of a licensed pilot generally compulsory in districts where there are licensed pilots, so as to include British vessels, has not the effect of repealing or even altering the local act. The most that can be said is that it adds to it, and, consequently, s. 89 of the general act, on which the plaintiffs rely as taking the port of Tyne out of the operation of that act, does not apply: and the decision in *Dodds* v. *Embleton* (1), if it proceeded on the opposite construction of the statutes, is erroneous. That case is of little authority; it is observable that Lord Tenterden does not take any notice of it in the edition of Abbott on Shipping, revised by himself, and published soon after the case was decided; and in Maude and Pollock on Shipping, 3rd edit. p. 222, n (*d*), the decision is put as proceeding on the preamble of the statute of Geo. 4. The cases of *The Killarney* (2), as to the port of Hull, and *Carruthers* v. *Sydebotham* (3), and *The Attorney General* v. *Case* (4), as to the port of Liverpool (though the two latter are not easily reconcileable, as is said in Abbott on Shipping, 5th edit. p. 160), are authorities, as far as they go, in the defendants' favour, and shew that a contrary construction has been put upon the general act of Geo. 4, coupled with the local acts.

(1) 9 D. & R. 27. (2) 1 Lush. Ad. 427; 30 L. J. (P. M. & A.) 41.
(3) 4 M. & S. 77. (4) 3 Price, 302.

E. James, Q.C. (with him *Liddell, Q.C.*, and *G. Bruce*), for the plaintiffs, was not heard.

KELLY, C.B. The question in this case is, whether the master of the defendants' steamer was bound, under the provisions of the several acts of parliament, to employ a pilot upon the occasion of the ship entering the Tyne, under the circumstances mentioned in the case. The first statute upon which the question turns is the local act, 41 Geo. 3, c. lxxxvi., which relates to enlarging the powers of the Trinity House at Newcastle-upon-Tyne. And by the preamble of that act it appears that certain persons, called the corporation of the Trinity House of Newcastle-upon-Tyne, have exercised for a long series of years certain privileges, and amongst others that of licensing pilots for the port of Tyne, and this power is expressly conferred by s. 1 on the corporation; and by s. 6 it is enacted what description of vessels shall be navigated by those pilots, and the section enacts that all foreign vessels resorting to, or coming into, or departing from, the port of Newcastle-upon-Tyne, shall be obliged to take on board and employ a pilot licensed by the corporation; but then follows a proviso, which, though negative in character, it must be remembered, forms part of the act, and operates affirmatively upon the duties of masters of British vessels frequenting the port; and the effect of the whole section is, that pilots shall be employed on board foreign vessels, but that no other vessels shall be bound to employ licensed pilots. The next statute is 6 Geo. 4, c. 125; and it is contended on the part of the defendants that by s. 58 it has become generally compulsory upon masters of British as well as of foreign vessels to employ a licensed pilot, if such a pilot is to be found, subject to certain exceptions in ss. 59 and 89; and further it is contended that neither s. 59 nor s. 89 includes the present case. Assuming the effect of s. 58 to be that contended for, we have to consider whether this case is not brought within s. 89, the material part of which is, that none of the provisions in the previous part of the act are to have the effect of altering or repealing any provisions as to pilots in any district for which special provision has been made. Now, if the effect of s. 58 is to make the employment of a pilot compulsory in the Tyne in cases where it was not compulsory before, is

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not that to alter the provisions of the local act? It is to be remembered that it is not now for the first time that this point has been raised. In the year 1826, very shortly after the later act passed, the Court of Queen's Bench was called upon to put a construction upon the two statutes, and that Court, presided over by Lord Tenterden, a judge eminently familiar with the subject, determined that a case, precisely similar in its circumstances to the present, was within s. 89, and consequently that it was not compulsory on the master of a British vessel to employ a pilot in the Tyne. We have now to consider for ourselves what construction ought to be put upon the statutes, and whether the construction put upon them in *Dodds* v. *Embleton* (1) is right. [The Lord Chief Baron read s. 89.] Although it may be said that to make it compulsory on a British vessel to employ a pilot in the Tyne, would not be to abridge or impeach the privileges of the Trinity House of Newcastle-upon-Tyne, nor to give any authority to the Trinity House of Deptford Strond, yet there are other words towards the end of the section, which seem to this Court amply sufficient to justify the construction put on the statute by the Court of Queen's Bench, viz. that nothing in the act shall extend "to alter or repeal any provisions contained in any act of parliament relating to the pilots of any ports or districts in relation to which particular provision shall have been made in any act of parliament as to the pilots, or pilotage, or to the pilotage within the limits prescribed by any act of parliament relating to pilotage for such ports;" and when we find a series of provisions in a local act of parliament determining the whole law of pilotage as applicable to the port of Newcastle, is it possible to say that an enactment, by which it was made compulsory to employ a pilot in cases in which the local act had said that it should not be compulsory, is not an enactment to alter or repeal the local act? It has the effect, if not of repealing, most certainly of altering the provisions of the local act as to pilotage in the district. Therefore, independently of the high authority of the judges who decided *Dodds* v. *Embleton* (1), we are clearly of opinion that, on the construction of the older statutes, there was no obligation on the defendants to employ a licensed pilot; that exemption from obligation is continued by s. 353 of the 17 &

(1) 9 D. & R. 27.

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18 Vict. c. 104, and consequently the defendants are not protected by s. 388 from the consequences of the pilot's fault.

Some cases have been cited as to the ports of Hull and Liverpool; they are somewhat contradictory, but they do not affect the authority of *Dodds* v. *Embleton*, and have no direct application to the present case.

WILLES and BYLES, JJ., and CHANNELL and PIGOTT, BB., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Cookson & Wainwright.*

Attorneys for defendants: *Pearce, Phillips, & Pearce.*

[IN THE EXCHEQUER CHAMBER.]

Nov. 28.

WOOD AND OTHERS *v.* DUNN.

Debtor and Creditor—Bankruptcy—Garnishee—Rights and Liabilities of Judgment Creditor, Garnishee, and Assignees under Composition Deed or Bankruptcy—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 197—*Bankruptcy Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 184—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 61—65.

Declaration, for a debt due from the defendant to S., by the plaintiffs as trustees under a deed for the benefit of the creditors of S. under the Bankruptcy Act, 1861, all the requirements of which had been complied with so as to vest the debt in the plaintiffs. Plea, that a judgment creditor of S. had obtained an order, attaching the defendant's debt and calling on him to shew cause why he should not pay it to the judgment creditor. That the defendant having no notice of the trust deed had no cause to shew, and an order was made upon him to pay the debt to the judgment creditor. That this order was, before the defendant had any notice of the trust deed, served upon him, and the defendant, in compliance with the order, and to avoid and because he could not otherwise have avoided execution, paid the debt to the judgment creditor. Replication, that the trust deed was registered under the Bankruptcy Act, 1861, before payment by the defendant to the judgment creditor. On demurrer to the replication:—

The Court, reversing the judgment of the Queen's Bench, gave judgment for the defendant, holding:—

That a deed for the benefit of creditors under the Bankruptcy Act, 1861, all the requirements of which have been complied with so as to bring s. 197 into operation, is, when registered, equivalent to an adjudication of bankruptcy.

That, though the payment by the defendant to the judgment creditor was made after the registration of the deed, the plea must be taken to mean, either that the defendant paid without notice of the deed, or, if with notice, that it was under

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such circumstances that he was unable to get the order set aside before he was compelled to pay to save execution being actually levied; and that, in either case, the payment was a protection to the defendant, the garnishee, as made under an order of a court of competent authority.

Semble, that the plaintiffs' remedy was against the judgment creditor for money received to their use; as he was in the position of a person having security for his debt, but not a lien, within s. 184 of the Bankruptcy Act, 1849.

Semble, also, that if the garnishee has notice of a trust deed or bankruptcy before the time for shewing cause against the ex parte order has elapsed, he would be bound to shew cause, and if he were to pay to the judgment creditor, instead of shewing cause, the assignees could recover the debt from him.

Quære, whether, if the garnishee has notice of a trust deed or bankruptcy, after the order for payment has been made and served, but before payment, he would be safe in paying without taking any other step; or whether he would be bound, if there were opportunity, to apply to get the order set aside; or whether it would be sufficient to give the assignees notice that he should pay, unless they got the order set aside.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiffs, on a demurrer to a replication. (1)

The following is the substance of the pleadings:

Declaration (by the plaintiffs as trustees for the creditors of one R. Stap, under a deed made in pursuance of the Bankruptcy Act, 1861, under which deed, all things necessary having been done and happened, the present causes of action vested in the plaintiffs) against the defendant, as clerk to the local board of health of the Darlington district, to recover a debt due to Stap for work done by him under a special contract with the board.

Plea, that certain joint creditors of Stap had recovered two judgments against Stap, and obtained two garnishee orders, attaching the present debt due from the board to Stap, and calling on them to shew cause why they should not pay the debt to the judgment creditors; that before the defendant or the local board had any notice or knowledge of the trust deed, and before the registration of it under the Bankruptcy Act, 1861, the orders were served on the defendant and the board, and the board not knowing of any cause to shew did not appear; and two other orders, ordering the board forthwith to pay the amount of their debt to Stap to the judgment creditors, or in default that execution might issue for the same, were made; which orders were, before the defendant or the board had any notice or knowledge of the trust deed,

(1) Law Rep. 1 Q. B. 77.

served upon the defendant and the board, and payment demanded; and the board, in compliance with the orders, and in order to avoid execution being levied, and because they could not otherwise have avoided such execution, paid the debt to the judgment creditors, and were thereby discharged from all claims by Stap and the plaintiffs as trustees under the deed in respect of the same.

Replication, that the trust deed was registered under the Bankruptcy Act, 1861, before payment by the board to the judgment creditors.

Demurrer and joinder.

The Court of Queen's Bench gave judgment for the plaintiffs, on the ground that the payment, being after registration of the deed, was not protected, though made under the garnishee order. (1)

Cleasby, Q.C. (with him *Rew*), for the defendant (the plaintiff in error). The facts admitted on the record are shortly these: The plaintiffs sue for a debt payable to them as trustees for the creditors of Stap, under a deed registered under the Bankruptcy Act, 1861; and the local board (who may be called the defendants) set up as a discharge that the debt was paid to the judgment creditors of Stap, under pressure of a garnishee order; the payment being made after the registration of the deed, but without notice. On this state of facts, two propositions are maintained by the defendants: First, assuming that the debt as between the trustees and the judgment creditors had passed, by virtue of the registration of the deed, to the trustees before the defendants paid it over, that still they are protected by the garnishee order; and the right of the trustees under s. 184 of Bankruptcy Act, 1849, 12 & 13 Vict. c. 106, is matter to be contested between the trustees and the judgment creditors. Secondly, that the deed, conceding it to have, on registration, the same effect as an adjudication in bankruptcy, had no operation on the defendants' debt. First, the payment was protected as made under the order of a Court of competent authority.

[ERLE, C.J. The defendants' first proposition assumes that they paid without notice?]

The plea alleges, that the order to pay was, before the defendants

(1) Law Rep. 1 Q. B. 77.

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had notice or knowledge of the deed, served upon them; and they paid to avoid and because they could not otherwise have avoided execution. The replication only alleges, that the deed was registered before the payment, not that the defendants had notice. It ought therefore fairly to be taken that the defendants had no notice. But assuming the defendants had notice, they paid because they could not otherwise have avoided execution: and that is a protection to them.

[PIGOTT, B. The garnishee's duty is to obey the order: not to contest conflicting claims.]

The judgment creditors and the trustees may fight it out. Payment under the order, even if it be subsequently set aside, is a valid discharge under s. 65 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125); and the principle is well known to the law, that payment, having been made under the authority of an order of a competent Court, is a valid discharge to the person paying. *Allen* v. *Dundas* (1) is a good instance of the principle; the defendant had paid money, due to a deceased person, to an executor under probate granted to him of a will which turned out a forgery; the payment was held a discharge, and the ground of the decision is shortly summed up by Grose, J.: "The law, which is founded on wise and sound principles, will never compel any person to pay money a second time, which he has once paid under the sanction of a Court having competent jurisdiction."

[WILLES, J. In *Cannan* v. *South Eastern Railway Company* (2), it was held that a wharfinger who had property of a bankrupt and delivered it to him after the fiat, was protected under s. 84 of 6 Geo. 4, c. 6; and that the fiat was not notice per se. I do not know, however, that that touches the present argument.

POLLOCK, C.B. The remedy of the trustees would seem to be against the creditor who has received the money.]

Precisely: and the cases as to the effect of these orders do not decide otherwise, though the Court below seems to have thought that they did. *Turner* v. *Jones* (3) is the only case where payment had actually been made *to* the judgment creditor; and there it clearly was unprotected, no order for payment having been made; but the

(1) 3 T. R. 125, 133. (2) 7 Ex. 843; 21 L. J. (Ex.) 257.
(3) 1 H. & N. 878; 26 L. J. (Ex.) 262.

judgments of the Court rather bear the inference that the Court thought, if the payment had been made under an order for payment, it would have protected the garnishee; and it is observable, that at the end of the case Bramwell, B., added: "I did not advert to this, that the actual payment was after the bankruptcy, but that of course cannot affect the case." (1)

Secondly, the deed, conceding to it, when registered, the same effect as an adjudication of bankruptcy, had no operation. In other words, a subsequent bankruptcy has no effect on the debt already attached under a complete garnishee order. The order is not a security but an absolute transfer of the sum ordered to be paid, and the delay of the garnishee in paying cannot affect the judgment creditor's rights. In *Holmes* v. *Tutton* (2), the service of the order attaching a debt was held to bind the debt only so far as to make the judgment creditor a creditor having security within s. 184 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), and not to give a lien within the exception in that section; and in *Tilbury* v. *Brown* (3), Crompton, J., in the Bail Court, held, that the order absolute to pay had no greater effect, inasmuch as by s. 65, the garnishee is not discharged against the judgment debtor till payment or execution. The latter case at any rate is wrong, and the judgment in the former, on which the latter is founded, proceeds upon an erroneous principle. The Court drew an analogy between the binding by service of the order of attachment under the Common Law Procedure Act, 1854, and the seizure by the sheriff of choses in action under the 1 & 2 Vict. c. 110, s. 12. But a bill of exchange seized under a fi. fa. was just in the position of goods seized; and a "sale" in the 184th section of the Bankruptcy Act, 1849 (in which sale was first made necessary to protect the execution creditor's title as against an intervening bankruptcy), can have no application to a bill of exchange. The cases, therefore, at the best, are doubtful; but, at all events, there is no case that decides that, when the money has been actually paid to the judgment creditor, under compulsion of the order to pay, and to avoid execution, the remedy of the assignees is against the garnishee rather than against the judgment creditor.

(1) 26 L. J. (Ex.) at p. 265. (2) 24 L. J. (Q.B.) 346; 5 E. & B. 65. 1 Jur. N.S. 975.
(3) 30 L. J. (Q.B.) 46. 6 Jur. N.S. 1151.

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Mellish, Q.C. (with him *W. T. Barnard* and *Warton*), for the plaintiffs. It is not disputed on behalf of the defendants that registration of the deed of composition under the Bankruptcy Act, 1861, puts all parties in the same relative position as an adjudication of bankruptcy. First, putting aside the question of notice, payment under a garnishee order *after* an adjudication of bankruptcy against the judgment debtor is nugatory. The judgment creditor, having obtained a garnishee order, is in the position of a creditor having security for his debt, but no lien, within s. 184 of the Bankruptcy Act, 1849, and bankruptcy intervening vests the debt due from the garnishee in the assignees, as was decided in *Holmes* v. *Tutton*. (1) The garnishee orders are nothing more in effect than obtaining execution against a particular part of the debtor's property; and the principle applicable is, that unless this quasi execution is executed by something equivalent to seizure and sale before the adjudication, the attachment falls to the ground. This is well reasoned out in the judgment in *Holmes* v. *Tutton*. (1) That case was decided eleven years ago, and has never been questioned. The whole policy of the bankruptcy acts is ever against execution creditors, and in favour of the creditors at large. The next case is *Turner* v. *Jones* (2), in which the Court of Exchequer approved of the principle of *Holmes* v. *Tutton* (1), and acted upon it. The last case on the subject is *Tilbury* v. *Brown* (3), in which Crompton, J., after consulting other judges, carried the decision in *Holmes* v. *Tutton* to its logical conclusion, and held that the order to pay, or in default execution to issue, had no further operation than the order attaching the debt, if not carried out by payment or execution levied before the bankruptcy. Section 65 of the Common Law Procedure Act, 1854, was relied upon by the other side, but it only makes the payment or execution a valid discharge as against the judgment debtor: the assignee's title is paramount to the debtor's. Lastly, as to the question of notice. The payment was after the registration, and notice, therefore, is immaterial, as was held in the court below. But, if it be material, then it is clear that the defendants are bound to allege that the payment was without

(1) 5 E. & B. 65; 24 L. J. (Q.B.) 346. 6 Jur. 459 75.
(2) 26 L. J. (Ex.) 262; 1 H. & N. 878.
(3) 30 L. J. (Q.B.) 46. 6 Jur. N.S. 1151.

notice, as the matter lies wholly in their knowledge; and the plea, though it expressly alleges that the service of the order was before notice, does not go on to allege that payment was also before notice; if, therefore, it is material, the payment must be taken to have been with notice of the deed. In *Watts* v. *Ognell* (1) it was held that, in debt for rent by assignee of the reversion, the plaintiff need not allege notice to the lessee, but the lessee may plead payment to the original lessor without notice of the assignment.

Cleasby, Q.C., in reply. The decision in *Holmes* v. *Tutton* (2) may well stand, and yet the applicability of it to a final order be questioned; and the judgment is erroneous in treating the seizure of a bill of exchange as not giving an absolute right to the execution creditor. The argument for the plaintiffs leaves untouched the first point made in favour of the defendants: assuming that, as between the judgment creditor and the assignees, the debt vests in the latter by virtue of the bankruptcy or registration of the trust deed, yet it does not follow that the garnishee is not protected, having paid by compulsion of an order of competent authority, and that the remedy of the assignees is against him, rather than against the judgment creditor; and none of the cases cited is the slightest authority for this proposition. As to the question of notice, the plea may well be taken to mean that payment was made without notice; or, if it is silent on the point, the replication, if the plaintiffs relied on notice, should have alleged it, whereas it simply alleges that payment took place after registration of the deed. At all events, taking the plea most against the defendants, it admits that the payment was made with notice, but alleges that it was under such circumstances that the defendants could only avoid actual execution by paying: and that makes the payment a good discharge.

Cur. adv. vult.

November 28. The judgment of the Court was delivered by

CHANNELL, B. In this case error was brought upon a judgment of the Queen's Bench upon a demurrer.

The facts stated and admitted on the pleadings are as follows.

(1) Cro. Jac. 192. (2) 5 E. & B. 65; 24 L. J. (Q.B.) 346.

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A debt was due from the defendants to one Stap. Certain persons named Russell jointly recovered two judgments against Stap, and then obtained garnishee orders attaching the defendants' debt to Stap and a summons calling on them to shew cause why they should not pay it to the judgment creditors. Orders were afterwards made directing such payment, and duly served: and up to this time admittedly the defendants had no notice of any trust deed or any assignment by Stap of their debt to him. The defendants paid according to the orders; but before this payment, Stap had executed and there had been registered a trust deed, transferring to the plaintiffs by force of the Bankruptcy Act, 1861, the debt due to Stap from the defendants. The plaintiffs now sue for it.

A doubt has been suggested arising upon the construction of the plea, whether it is to be taken to be alleged upon the pleadings that the defendants had notice of the deed before payment. This question, if we think it material, we must decide, as well as the main one, whether the payment so made protects the defendants in this action.

Now the plea alleges that the payment was made in order to avoid execution being levied, and because the defendants could not otherwise avoid such execution. This is admitted on the record, and the payment being so made, we should be anxious, unless prevented by some positive statutory enactment or decided authority, to hold it a protection, on the broad principle, one exemplification of which is given in *Allen* v. *Dundas* (1), quoted by Mr. Cleasby, viz. that the law will never compel a person to pay a sum of money a second time which he had paid once under the sanction of a Court having competent jurisdiction.

It has not been contended before us that there is any difference between this case, the deed having been registered, and the case of an adjudication of bankruptcy. Indeed it is clear there is none, if all the requisitions of the Bankruptcy Act, 1861, have been complied with, so as to bring the 197th section of the act into operation with respect to the deed: which is admitted on the record here.

It was pressed upon us in the argument on the part of the plain-

(1) 3 T. R. 125.

tiffs that it had been the evident policy of the bankruptcy laws to provide as much as possible for the equal distribution of assets among creditors, and to discountenance priorities or preferences. This is no doubt so: but the argument sought to be deduced from the fact does not necessarily follow. It may be that the payment made by the garnishee to the judgment creditor may be a good payment, so as to relieve him from paying his debt a second time to the assignees of the judgment debtor, and yet that the payment may not be good for all purposes, so as to enable the judgment creditor to get payment of his debt in full, to the prejudice of the other creditors of the bankrupt. For it may be that the assignees may treat the payment, being after bankruptcy, as money received by the judgment creditor to their use, and so recover it from him, leaving him to get a dividend only on his debt; and we cannot but think that, in justice, the loss ought to fall on the judgment creditor rather than on the garnishee. Even supposing that we must take it upon these pleadings, that the defendants had notice of the assignment before paying under the order, though after service upon them, and that thereupon, instead of paying, they had the opportunity of taking some proceeding for the purpose of having the order rescinded, still it would be a hardship upon them to have to take the initiative in a proceeding of this sort to set aside an order, which they had had no power of preventing being made upon them, and which they were perfectly able and willing to obey, if they were only safe in doing so.

It will be necessary, therefore, to examine the cases decided as to the effect of these garnishee orders, and see whether we find anything in them which induces us, sitting in a court of error, to decide in opposition to the broad principle of protecting honest payments made under competent authority.

The first case quoted was *Holmes* v. *Tutton*. (1) There a garnishee, who had been served with an order attaching the debt he owed to the judgment debtor, had disputed his liability on the ground of the bankruptcy of the judgment debtor, and thereupon the judge, instead of making an order for payment, directed a proceeding by writ, under section 64 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). After a writ had issued, a

(1) 5 E. & B. 65; 24 L. J. (Q.B.) 346.

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special case was stated. The Court decided that the judgment creditor was not entitled to recover against the garnishee; for the order of attachment did not conclusively vest the debt in the judgment creditor as against the assignees of the judgment debtor. They held that the judgment creditor was in the position of a creditor having security for his debt within the meaning of section 184 of the Bankruptcy Act, 1849; but that he had not a lien within the meaning of the word in the clause of exception in that section.

This case, therefore, shews that, if the present defendants had had notice of the trust deed, at the time, or after the ex parte order of attachment was served upon them, and before the time for shewing cause, they would have had good cause to shew, and the order for payment would not have been made; and we think there can be no doubt that, in that case, the proper course to take would be to shew cause, and if the garnishee were to pay instead of shewing cause, that the assignees could recover against him. This was very nearly what was decided in the next case: *Turner* v. *Jones*. (1) There the garnishee was served with an order attaching in his hands a debt not really due at the time. Instead of shewing cause, as directed by the ex parte attachment order, or even waiting for an order for payment to be made upon him, he gave promissory notes for the amount to the judgment creditor. The judgment debtor then became bankrupt; and it was held that his assignees could recover against the garnishee the amount of his debt on its becoming due. Here clearly what the garnishee did could not be said to be in obedience to the order served upon him, which called upon him to shew cause, and not to pay; and neither by the words of the statute, nor by the principle of law, as to compulsory payments, could he be protected against the claim of the assignees.

Then comes the case of *Tilbury* v. *Brown*. (2) This was a decision of Mr. Justice Crompton in the Bail Court, after consulting some other judges. He held that, after an order for payment had been made, and before execution had been levied or payment made, the judgment creditor was still only in the position of a creditor having security for his debt, and that the judgment debtor having become

(1) 1 H. & N. 878; 26 L. J. (Ex.) 262. (2) 30 L. J. (Q.B.) 46.

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bankrupt while things were in this state, and afterwards execution having been levied and the money paid into court by the garnishee, the judgment creditor was not entitled to have it paid out to him; that is to say, that while matters were in this state the proper person to receive the money was not the judgment creditor, who ought only to have a dividend, but the assignees of the bankrupt, for the benefit of all the creditors. We do not think, however, that this case at all decides that, if the payment had been made, and the assignees had been put to recover it from some one, their action should not have been against the judgment creditor for money received to their use, rather than against the garnishee. If it did so decide, we are not, sitting as a court of error, bound by that decision.

First, take the case of payment being made under the order without any notice of an assignment; there we think we ought to hold that the payment has been made under the sanction of a competent authority, and that it ought to be protected. The case, too, would then, we think, come within the express words of section 65 of the Common Law Procedure Act, 1854, giving protection. (1) If, in fact, at the time of payment the debt had vested in assignees, they might recover it against the judgment creditor to whom it was paid, as money received to their use; for the judgment creditor, having been in the position of one having security only for his debt and not a lien, at the time of the bankruptcy, or registration of the deed, which is the same thing, was by the bankrupt law not entitled to get payment in full.

Next, suppose the case of notice of the bankruptcy or assignment being given to the garnishee, after the order for payment was served on him, but before he pays. This is a case of considerable difficulty. It may be that, according to the case of *Tilbury* v. *Brown* (2), if the garnishee were then to apply to have the execution under the order stayed, this would be done. The question is, whether it is incumbent on him to take the initiative

(1) 17 & 18 Vict. c. 125, s. 65: "Payment made by or execution levied upon the garnishee, under any such proceeding as aforesaid, shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside or the judgment reversed."

(2) 30 L. J. (Q.B.) 46.

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in this proceeding, or whether it is not rather for the assignee to take this step; and if he neglects, whether the garnishee is not safe in obeying the order, leaving the assignee to recover the money against the judgment creditor. This is also a point of some difficulty; and we think it is not necessary for us to decide that it would be safe for a garnishee, having been served with an order to pay, and afterwards, and before payment, receiving notice of a bankruptcy or a trust deed, after that to pay under the order, without an immediate threat of execution, and without taking any steps himself to get the order set aside, or giving notice to the assignee informing him that he should pay unless the assignee got the order set aside.

In the present case, it is alleged in the plea that the payment was made to avoid execution, and because execution could not be otherwise avoided. It is not replied to that, that the defendants had had notice of the deed, but simply that the deed had been registered. We think we must take the allegation in the plea to import, either that the defendants had no such notice, or that if they had, it was under such circumstances that they were unable to get the order set aside before they were compelled to pay under the immediate threat of an execution, and to save its being actually levied. In either of these cases we think the remedy of the assignees is against the execution creditor.

It follows, that we think the judgment of the Court of Queen's Bench is erroneous and must be reversed.

It is noticeable that the view which was presented to us by Mr. Cleasby, and on which our opinion is mainly founded, does not appear to have been prominently brought forward in the court below, viz. that the cases only shew, that the judgment creditor, in these cases where a bankruptcy has supervened, is not entitled to be paid in full; and do not shew that, when payment has been made, the assignees ought to sue the person who has made the payment, rather than the one who has received it.

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We think, therefore, that it sufficiently appears in this plea, that the payment was made in obedience to the order of a competent authority, and is therefore protected, and the judgment of the Court of Queen's Bench should be reversed.

The judgment I have delivered is to be taken as the judgment

of my Brothers Willes and Pigott and myself; but the case was argued before Lord Chief Justice Erle and Lord Chief Baron Pollock, then members of the Court, and this judgment has their sanction.

Judgment reversed. (1)

Attorneys for plaintiffs: *H. J. Riches.*

Attorneys for defendant: *Lever & Son, for H. Dunn, Darlington.*

(1) The following case was argued in the Court of Exchequer on November 26th, two days before the judgment of the Exchequer Chamber was delivered in the above case:

EUROPEAN BANK (LIMITED) *v.* FOX.

Ex parte GENERAL ESTATES COMPANY (LIMITED).

THE plaintiffs having recovered judgment, obtained a garnishee order upon the General Estates Company (Limited) under the Common Law Procedure Act, 1854, s. 61. The order was made absolute under s. 63, on the 24th May, 1866, but execution was delayed at the request of the garnishees. On the 29th of June the defendant was adjudged bankrupt. On the 14th July execution was issued against the garnishees under s. 63, and on the 20th July it was levied. The garnishees then applied to Bramwell, B., at Chambers, to set aside the execution on the ground of the intervening bankruptcy. The summons was adjourned to enable the creditors' assignee to appear, and he having afterwards appeared by his attorney, and waived all claim to the debt as against the plaintiffs, and consented to the money being paid to them, the learned Baron stayed proceedings till the present term, in order to give the garnishees the opportunity of taking the opinion of the Court.

Dixon having obtained a rule nisi on behalf of the garnishees to set aside the execution,

A. L. Smith shewed cause, and distinguished *Wood* v. *Dunn*, on the ground that the assignee had here waived his claim.

The assignee was not made a party to the rule, but was served with it, and *Wood* appeared on his behalf on the argument. The Court, however, refused to hear him, on the ground that the assignee was not a party, but it was understood that the assignee adhered to his disclaimer.

Dixon, in support of the rule, relied upon *Wood* v. *Dunn*, then pending in the Exchequer Chamber.

THE COURT (Kelly, C.B., Bramwell, Channell, and Pigott, BB.) discharged the rule, holding that, whatever the rights of the assignee might have been, the garnishees had no independent right to resist payment, and the assignee having waived his claim, there was no reason for depriving the judgment creditors of the benefit of their execution.

Rule discharged.

Attorney for plaintiff: *J. H. Taylor.*

Attorneys for defendant: *Sewell, Sewell, & Edwards.*

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SANDEMAN AND OTHERS *v.* SCURR AND OTHERS.

Ship—Charterparty—Bill of Lading—Liability of Owner of chartered Ship—Principal and Agent—Master and Shipowner—Carrier—Liability for Stowage of Goods—Stevedore.

A ship was chartered for a voyage from Oporto to the United Kingdom, to load from the factors of the affreighter a full cargo of wine or other merchandize at 18*s.* per ton; the captain to sign bills of lading at any rate of freight without prejudice to the charter; the ship to be addressed to charterer's agents at Oporto on usual terms. The ship was accordingly consigned to the charterer's agents at Oporto, and was put up by them as a general ship, without any intimation that she was under charter; the plaintiff shipped some casks of wine, and received bills of lading in the common form signed by the master. The wine was stowed by a stevedore appointed by the charterer's agents and paid by them, the money being ultimately repaid them by the master. The wine having leaked from improper stowage:—

Held, that as the charter did not amount to a demise of the ship, and the owners remained in possession by their servants, the master and crew, the shipper was entitled to look to the owners as responsible for the safe carriage of the wine: inasmuch as he had delivered it to be carried in the ship in ignorance that she was chartered, and had dealt with the master, who was still the owners' master, as clothed with the ordinary authority of a master to receive goods and give bills of lading by which his owners would be bound.

Held, also, that the employment of the stevedore made no difference, at all events as regarded the shipper, as he was no party to the employment, and had a right to look to the owners for the safe stowage of the goods, as part of the carrier's duty, in the absence of any special agreement.

Quære, whether the charterer also would not have been liable to the shipper on the bills of lading signed by the master in furtherance of the charterparty.

DECLARATION, that the plaintiffs delivered to the defendants, and the defendants received from the plaintiffs, certain goods, to be by the defendants safely and securely shipped, stowed, and carried in the ship *Village Belle*, on a voyage from the river Douro, in Portugal, to London (the dangers of the seas only excepted), and there to be delivered for freight, payable by the plaintiffs to the defendants. Breach, that the defendants (though not prevented by the dangers aforesaid) did not safely and securely stow, ship, and carry the goods, but the goods were damaged through the defendants' negligence, and not by reason of the excepted dangers.

Pleas. First, that the plaintiffs did not deliver, and the defendants did not receive the goods on the terms alleged. Second, not guilty. Third, that the defendants were prevented from fulfilling

the terms of the alleged bailment by the dangers of the seas, and the damage was caused by such dangers.

Issue joined.

At the trial, before Cockburn, C.J., at the sittings in London after Trinity Term, 1865, it was proved, on behalf of the plaintiffs, that the defendants were the owners of *The Village Belle*, and Charles Bowden master. The plaintiffs' agent at Oporto, in January, 1864, shipped ten pipes of port wine for London under the following bill of lading:

"Shipped, in good order and well conditioned, by Sandeman & Co., in and upon the good ship called *The Village Belle*, whereof is master for this present voyage C. Bowden, and riding in the river Douro and bound for London, ten pipes red port wine, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London, the dangers of the seas only excepted, unto order or assigns, he or they paying freight for the said goods 22*s.* 6*d.* sterling per ton, with primage and average accustomed. In witness whereof the said master of the said ship hath affirmed to four bills of lading all of this tenor and date, one of which bills being accomplished the others to stand void.

Oporto, 27th January, 1864.

To be delivered from the ship's side in the London docks.

Charles Bowden."

[Indorsed.]

"Sandeman & Co.

Freight to be paid at the rate of 20*s.* per ton.

Charles Coverley, Agent.

Oporto, 27th January, 1864."

The casks were in good order when shipped, but on the arrival in London there was leakage in one, owing, as the plaintiffs' witnesses said, to bad stowage; all the casks were delivered to the plaintiffs, and the freight paid, with the exception of a small balance, and the plaintiffs claimed to keep back a certain sum for the damage caused by the leakage; but ultimately, upon the defendants insisting, the balance of freight was paid to Messrs. Seldon, the defendants' agents; and this action was brought to recover the amount of damage.

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For the defendants the following evidence (subject to objection by the plaintiffs' counsel) was given: the captain had chartered the ship in London in October, 1863, on behalf of the owners, to Mr. Hodgson, under the following charterparty:

"London, 15th October, 1863.

It is this day mutually agreed between Captain Bowden, of the good ship or vessel called *The Village Belle*, of 182 tons measurement, master, now in London, with leave to take an outward cargo from the north, and C. H. Hodgson, Esq., of London, merchants, that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Oporto, or so near thereunto as she can safely get, and there load from the factors of the same affreighters a full and complete cargo of wine in pipes, hogsheads, and quarter casks, or other lawful merchandize, and the cargo to be brought to and taken from alongside the vessel at merchants' risk and expense, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded shall therewith proceed to a safe port in the United Kingdom, as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same on being paid freight as follows, viz. 18*s.* per tun of 252 gallons net wine delivered, and the captain to receive testoon money at Oporto on all wines shipped in lieu of gratuity; should other goods than wine be shipped the freight to be paid at the above rate on the quantity of wine the vessel would have carried, which quantity is to be stated by a competent stevedore at Oporto, such to be agreed upon by the charterer's agents and the captain, in full of all port charges and pilotages (restraint of princes and rulers, the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage always excepted). The freight to be paid on unloading and right delivery of the cargo in cash, less one month's discount. Thirty working days are to be allowed the said merchants (if the ship is not sooner despatched) for loading the ship, and to be discharged with all despatch as customary in any dock ordered by the charterer's agents, and ten days on demurrage over and above the said laying days, at 4*l.* per day

penalty for non-performance of this agreement. Estimated amount of freight . The captain to sign bills of lading, if required, at any rate of freight, without prejudice to this charter. The ship to be addressed to charterer's agents at Oporto on usual terms, sufficient cash to be allowed the captain at the port of loading for ship's ordinary disbursements.

Chas. Bowden,
p.p. C. H. Hodgson,
W. Bibbens."

[In the margin.]

"The ship, on her return, to be reported at the Custom House, London, by R. Seldon & Co., brokers, 27, Leadenhall Street, or by their agents at port of discharge."

[Indorsement.]

"This is to certify that all the days have been expended in loading. Freight to be paid vessel on 433 pipes as per measurement of stevedore.

Vessel on her arrival in London to proceed to the London docks and there discharge her cargo.

p. C. Coverley,
J. M. Cutler,
Chas. Bowden.

Oporto, 30th January, 1864."

The ship proceeded with a cargo of coals to Oporto, and when the master had discharged them, he ascertained that C. & Co. were the charterer's agents, and handed over the ship to them. Messrs. Coverley advertised the ship simply as a general ship. (1) Amongst others, the plaintiffs' agent shipped the wine in question through Messrs. Coverley, and the bills of lading were prepared by them, and were signed by the master at Messrs. Coverley's office. Pinto, a stevedore appointed by Messrs. Coverley, stowed the whole cargo, the master being generally on board, but not interfering, and Pinto was paid by Messrs. Coverley, but ultimately the cost of stowage was paid them by the master, together with the address commission. The master was a part owner. He paid the crew. The defendants also gave evidence that the leakage was caused by stress of weather.

(1) This was from oral evidence, no copy of the advertisement was put in.

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The Chief Justice intimated that there was no evidence that the plaintiffs or their agents knew of the ship being chartered; and it was agreed that whether or not the defendants were liable should be left as a question for the Court. The only question left to the jury was how the damage was caused, and they found that it was caused by improper stowage. A verdict was accordingly entered for the plaintiffs for the amount of damage proved; with leave to move to enter a verdict for the defendants, or a nonsuit.

A rule was accordingly obtained, on the ground that the contract to stow and carry the goods was not made with the defendants, and that there was no liability on the defendants' part for improper stowage.

May 24. *Brett, Q.C.*, and *Garth*, shewed cause. The contract was made by the bill of lading between the master of the defendants' ship and the plaintiffs; there is no reference in it to the charterparty, and the plaintiffs had no knowledge of it, therefore the defendants are bound by the contract, and nothing dehors the contract can be looked at. But the charterparty, when put in, leaves the possession of the ship in the defendants, and only gives the use of it to the charterer, and the master remains the defendants' master, and they have a lien on the cargo for the bill of lading freight, as having possession of the goods. The result is, that the charter only affects the position of the owners to this extent, that they are bound to receive and fill up their ship with whatever lawful merchandize the charterer sends within the terms of the charter; but the position of the owners as regards the shipper remains unaffected, the owners get the benefit of the freight, inasmuch as they have at any rate a lien for it, and they must also take the correlative burthen, and be liable as carriers. *Gilkison* v. *Middleton* (1) shews conclusively that the master, where the ship is only chartered in the ordinary sense, and not demised, in signing bills of lading, acts for the shipowner; for it was held that the owner was estopped by the master's act, and could not claim a lien for more than the bill of lading freight. The master then remaining the agent of the shipowners, is an agent clothed with a well known general authority, and persons

(1) 2 C. B. (N.S.) 134; 26 L. J. (C.P.) 209.

dealing with him have a right to assume that he is acting under that authority, until the contrary is brought to their knowledge. *Blaikie* v. *Stembridge* (1) will be relied on by the other side; but in that case there was no bill of lading, and all that was decided was, that the master was not liable for damage arising from stowing the cargo, where there was no contract, and no wrong of himself or any one employed by him; but the case does not go to shew that the shipowner would not be liable after the bill of lading has been signed by their agent; and in *Sack* v. *Ford* (2) a clause was inserted to obviate the difficulty which had arisen in *Blaikie* v. *Stembridge*. (1)

E. James, Q.C., and *Dowdeswell*, in support of the rule. It is not contended on behalf of the defendants that there was anything in the charter amounting to a demise of the ship, or that the master and crew did not remain the defendants' servants; nor that the master of a chartered ship is not agent of the owners so as to make them liable to third persons for his acts in certain cases, as in the case of collision. But it is going too far to say that because the captain of a chartered ship remains the agent of the owners for the purpose of navigation, he may not also be the agent of the charterer in carrying out the purposes of the charter-party and signing bills of lading in pursuance of it. In the case of repairs, for instance, the question is, upon whose authority they were actually ordered, and the owner, merely from being registered as owner, is not liable. By the ordinary charter the whole of the ship is put at the disposal of the charterer, to be dealt with by him as he pleases; and the captain and crew become his servants for all purposes save that of navigation. Surely if the money for the bill of lading freight had been paid to the owner, the charterer could maintain money had and received: and, if so, he must also be liable on the contract which makes the money payable to him.

[COCKBURN, C.J. Conceding, as we are quite ready to do, that the charterer is bound by the bill of lading, the question is, whether, as regards a person dealing with the master of the ship in ignorance of the charter, the owner is not also liable for the acts of his apparent agent.]

(1) 6 C. B. (N.S.) 894; 28 L. J. (C.P.) 329: 5 Jur. N.S. 1120, 6 Jur. N.S. 915. 2 L.C.

(2) 13 C. B. (N.S.) 90; 32 L. J. (C.P.) 12. 9 Jur. N.S. 750.

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In *James* v. *Jones* (1) Lord Kenyon ruled that the master of a chartered ship was agent pro hâc vice of the charterer, and that the owners were not liable to the shipper.

[*Brett, Q.C.* From the note of that case in Abbott on Shipping (10th edit. pp. 32-3) it appears that the charterparty was referred to in the bill of lading.]

It is immaterial whether the shipper knew of the charter or not. The plaintiffs' agents were dealing with Coverley, who was professedly only an agent, and the master, in signing the bills of lading, was also, as the plaintiffs' agents knew, acting simply under Coverley's directions, who made the contract for freight, &c. Therefore, as the plaintiffs were dealing with a person who they knew was only agent, they were bound to inquire whose agent he was. Thus, in *Blaikie* v. *Stembridge* (2), the Court observes: "From the evidence of the agent of the shipper it would seem that he was aware of the ship being chartered, but it is unnecessary to rely upon that circumstance, because if he did not know it that was no fault of the owner or master." In *Mackenzie* v. *Rowe* (3) Lord Ellenborough held, that the owners of a chartered ship were not liable for goods shipped on board.

[*Brett, Q.C.* There was no pretence for a contract with the defendants there; and in Maclachlan on Shipping, p. 310, the general doctrine of that and other cases is said to be no longer law.

SHEE, J. The learned author adds, that *Parish* v. *Crawford* (4), supposed to have been overruled by the later cases, is again an authority; but in the later editions of Abbott on Shipping it is said that the cases are inconsistent, and probably *Parish* v. *Crawford* (4) is not to be considered law. I endeavoured to reconcile them in a note. (5)]

(1) 3 Esp. 27.

(2) 6 C. B. (N.S.) at p. 906; 28 L. J. (C.P.) at p. 330; 5 Jur. N.S. at p. 1129.

(3) 2 Camp. 482.

(4) 2 Str. 1251; Abbott on Shipping, 10th edit. pp. 31—2.

(5) Abbott on Shipping, 10th edit. p. 34, n. (*c.*): Are these cases inconsistent with each other? The charterparties in *Mackenzie* v. *Rowe*, and *James* v. *Jones*, are not set out in the reports of those cases. They probably —like the charterparty in *Frazer* v. *Marsh* (2 Camp. 517; 13 East, 238)— were such as to transfer the possession of the ship from the absolute owners to the charterers, so as to make the master and the crew the servants of the latter, and the contracts of the master the contracts of the charterers. This was plainly not the effect of the charterparty in *Parish* v. *Crawford*: for

There are other cases which shew that the owner of a chartered ship is not in possession for all purposes; for barratry can be committed by the master, with the consent of the owner, against the charterer: *Vallejo* v. *Wheeler* (1); *Soares* v. *Thornton.* (2) But even assuming that the bill of lading signed by the master might, under ordinary circumstances, make the owner liable, the damage in the present case was caused by bad stowage. Now, the bill of lading was not, of course, signed till after the goods were shipped and stowed. None of the defendants' servants had anything to do with the stowage; this was done by the stevedore appointed by Coverley, the contract, if any, at that time being only with him; and he was confessedly the charterer's agent. It cannot affect the question that the stevedore was ultimately paid by the owner; that is mere matter of arrangement between the charterer and owner, and does not make him the servant of the owner; as is pointed

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there the owner appointed the master, covenanted for his good behaviour, and reserved to himself the freight of passengers. From the report of that case in 2 Str. 1251 it also appears that bills of lading for the moidores were signed by the master. Those bills, it is submitted, were evidence of an express contract between the shippers of the goods and Crawford, by whom the master was appointed and employed. If that be so, *Parish* v. *Crawford* does not appear to be inconsistent with principle or with other decided cases. It could hardly have been determined otherwise consistently with the doctrine of the civil law: "Omnia facta magistri debet præstare qui eum præposuit, alioquin contrahentes deciperentur"—upon which passage of the Digest (lib. 14), Valin cites with approval this commentary of Peckius: "Quid enim interest, per se exercitor, an per eum quem ipse substituit, contractum ineat? . . . qui enim aliquem præponit, is clarâ et apertâ voce dicere videtur, hunc ego præposui, qui volet cum eo contrahat."—Comm. sur l'Ordonnance, liv. 2, tit. 8, art. 2.

"Exercitorem autem eum dicimus ad quem obventiones et reditus omnes perveniunt, sive is dominus navis sit sive à domino navem per aversionem conduxit, vel ad tempus, vel in perpetuum."—Dig. lib. 14, tit. 1, de Exercitoriâ Actione.

According to this definition, the charterer, in the case of *Parish* v. *Crawford*, was neither *dominus* nor *exercitor navis*. He might, to be sure, employ the master as his agent, to make contracts for his benefit with the shippers of goods, and be liable upon such contracts; but the question was, whether parties dealing with the master of the ship, as master, were not entitled to seek compensation for the loss of their goods from the person to whose servant, acting as such, they had been entrusted for safe carriage. See the case of *Mitchell* v. *Scaife* (4 Camp. 298), and the observations of Lord Tenterden in the three first editions of his Treatise.

(1) Cowp. 143.

(2) 7 Taunt. 627.

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out in the judgment in *Blaikie* v. *Stembridge* (1), citing *Quarman* v. *Burnett*. (2) No doubt the master and owner may be primâ facie liable for bad stowage, but not if by agreement the charterer is to appoint a person to do it: *Swainston* v. *Garrick*. (3) In *Sack* v. *Ford* (4), but for the special provision in the charter, the charterers could not have maintained an action against the owner for bad stowage by the stevedore appointed by the charterers; and if the charterers could not have maintained an action for such bad stowage against the owner, neither could a third person like the shipper. In *Blaikie* v. *Stembridge* (5) the Court of Common Pleas say: "After diligent search we have not found any authority for the position that a person sending goods to be loaded on board a general ship is entitled to assume, without inquiry, that his goods are to be shipped and stowed by the master rather than by a stevedore."

Cur. adv. vult.

Dec. 22. The judgment of the Court was delivered by

COCKBURN, C.J. This is a case which was argued before my Brothers Mellor and Shee and myself.

The action is brought against the defendants, who are the owners of the ship *The Village Belle*, for damage and loss occasioned by bad stowage, to certain goods shipped in that vessel by the plaintiffs. The facts upon which the case turns are as follows:

The Village Belle went to Oporto under a charterparty entered into between her master, on behalf of the owners, and a Mr. Hodgson, by which the master contracted to load at Oporto from the factors of the affreighter a full cargo of wine or other merchandize, and to carry the same to a safe port in the United Kingdom. Should the cargo consist of wine, the freight was to be 18s. per tun of 252 gallons; should other goods than wine be shipped, the freight was to be at the same rate on the quantity of wine the vessel would have carried, the quantity to be ascertained by a stevedore to be appointed by the charterer's agents and the

(1) 6 C. B. (N.S.) at p. 909; 28 L. J. (C.P.) at p. 332.
(2) 6 M. & W. 499.
(3) 2 L. J. (Ex.) 255.
(4) 13 C. B. (N.S.) 90; 32 L. J. (C.P.) 12.
(5) 6 C. B. (N.S.) at p. 911; 28 L. J. (C.P.) at p. 333.

master. The cargo was "to be brought to and taken from alongside the vessel at the merchant's risk and expense." The captain was to "sign bills of lading at any rate of freight, without prejudice to the charter." The ship was "to be addressed to the charterer's agents at Oporto on usual terms."

The ship accordingly proceeded to Oporto, consigned to the agents of the charterer. She was by them put up as a general ship, but without it being at all made known that the vessel was under charter. The plaintiffs delivered their goods on board without any knowledge that the ship was not entirely at the disposition of the owner. Bills of lading for the goods in question were signed by the master in the usual form. The cargo was stowed by stevedores employed and paid by the charterer's agents, but the amount so paid by the latter was repaid to them by the master.

The goods having been damaged by reason of improper stowage, the plaintiffs have brought their action against the defendants, as owners of the vessel; and the question is, whether the defendants, under the circumstances stated, are liable. We are of opinion that they are liable, and that the action against them lies.

On the argument, it was contended on behalf of the defendants, that, as the use of the ship had been made over to Hodgson, the charterer, and the ship had been put up as a general ship by his agents, and the bill of lading had been given by the captain in furtherance of a contract for freight of which the charterer was to have the benefit, the captain must be considered as having given the bill of lading as the agent of the charterer, and the contract as having been made with the latter, and not with the defendants, the owners of the vessel; and that, consequently, the charterer was alone responsible for the negligent stowing of the goods in question.

It is unnecessary to decide whether the charterer would or would not have been liable, if an action had under the circumstances been brought against him. Our judgment proceeds on a ground, wholly irrespective of the question of the charterer's liability, and not inconsistent with it, namely, that the plaintiffs, having delivered their goods to be carried in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master to receive goods and give

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bills of lading on behalf of his owners, are entitled to look to the owners as responsible for the safe carriage of the goods.

The result of the authorities, from *Parish* v. *Crawford* (1) downwards, and more especially the case of *Newberry* v. *Colvin* (2), in which the judgment of the Court of Exchequer Chamber (3), reversing the judgment of the Court of Queen's Bench (4), was affirmed on appeal by the House of Lords, is to establish the position, that in construing a charterparty with reference to the liability of the owners of the chartered ship, it is necessary to look to the charterparty, to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew.

In the first case, the charterer becomes for the time the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and through the master and the crew, who continue to be their servants, the possession of the ship also. If the master, by the agreement of his owners and the charterer, acquires authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owners; in other words, he retains that relation to his owners out of which by the law merchant arises the authority to sign bills of lading by which the owner will be bound.

It appears to us clear that the charterparty in the present instance falls under the second of the two classes referred to. There is here no demise of the ship itself, either express or implied. It amounts to no more than a grant to the charterer of the right to have his cargo brought home in the ship, while the ship itself continues, through the master and crew, in the possession of the owners, the master and crew remaining their servants.

It is on this ground that our judgment is founded. We think

(1) 2 Str. 1251; Abbott on Shipping, 10th ed. 31. (2) 1 Cl. & F. 283.
(3) 7 Bing. 190; 1 C. & J. 192. (4) 8 B. & C. 166.

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that so long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well known principle that, where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading. It may be that, as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But, in our judgment, this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office. We think that until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made.

In *Newberry* v. *Colvin* (1), Tindal, C.J., in delivering the judgment of the Court, observes, that the finding of the jury, that the charterparty was known to the shippers, "negatives any inference that would otherwise have arisen, that the master, by reason of his command of the vessel, was held out by the defendants as their agent in the conduct and management of the ship, as the shippers knew the real situation and relative rights of the captain and the owners before they put their goods on board to be carried on that voyage." From this language it may be inferred, that, had this material circumstance not existed in that case, the decision might have been different, even though the Court there held that there had been a demise of the ship.

In the case of *The St. Cloud* (2), which was recently before the

(1) 7 Bing. at pp. 206—7; 1 C. & J. at p. 215. (2) Brow. & Lush. 4, 15.

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Court of Admiralty, but which was not referred to on the argument before us, Dr. Lushington, a very high authority in such matters, on a charterparty substantially the same as the present, and where the goods had been shipped in ignorance that the vessel was under charter, held the owners liable on bills of lading signed by the master. After referring, as to the effect of the charterparty, to *Schuster* v. *McKellar* (1), he goes on to say: "But there is an important distinction in this case. The shipper is not proved to have had notice of the charterparty. Until he had such notice, he would be justified in supposing that, in dealing with the master for the carriage of his goods, he was dealing with the owner's agent; for, primâ facie, the master is the agent of the owner of the ship. I cannot think that it is consistent with justice, or according to the ordinary mercantile practice, that a shipper of goods on board a ship put up in the usual way should lose his right to sue the owner for damage, on account of a charter of this description, of which he has no notice. I think the burthen of proof must fall upon the shipowner claiming exemption from liability; he must shew that the shipper had notice of the charter, and was aware that in making the contract the master was agent for the charterer."

In this view we entirely concur, and hold the defendants to be liable.

We attach no weight to the fact that the stevedores by whom the cargo was loaded were appointed by the charterer's agents. The stowage of goods, in the absence of any special agreement, forms part of the obligation which the carrier takes upon himself. It is a duty to be discharged by the master and crew. By this charter the intervention of a stevedore is only made necessary in order to ascertain the quantity the ship could carry. There is nothing to release the master and crew from their responsibility in respect of the stowage. The stevedores were probably appointed by the charterer's agent for the convenience of the master, the agents being acquainted with the port and knowing who were fit persons to be employed. The expense was ultimately defrayed by the master. At all events, the plaintiffs were no parties to the employment of the stevedores, and have a right to look to the owners for the proper stowage and safe conveyance of the goods.

(1) 7 E. & B. 704, 723; 26 L. J. (Q.B.) 281, 288.

For these reasons we are of opinion that the rule to enter the verdict for the defendants must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Tathams, Curling, & Walls.*
Attorneys for defendants: *Mercer & Mercer.*

IRELAND AND OTHERS *v.* LIVINGSTON. *Nov.* 13.

Principal and Agent—Order to Purchase, Construction and Revocation of—Usage of Place.

The defendant, in London, wrote to the plaintiffs, commission agents at the Mauritius: "Should the beet crop prove less than usual, there may be a good chance of something being made by importing cane sugar, at about the limit I am going to give you as a maximum, say 26*s.* 9*d.* for nos. 10 to 12, and you may ship me 500 tons, to cover cost, freight, and insurance; 50 tons more or less of no moment, if it enable you to get a suitable vessel." So large a quantity of sugar as 500 tons could not be purchased in one lot at the Mauritius, and it was the customary course of business there, in carrying out an order for a large quantity of sugar, to purchase it in smaller quantities from time to time of different persons. The plaintiffs had thus purchased for the defendant 400 tons, when prices rose, and before the order could be completed, the defendant countermanded it:—

Held, that the clause as to "50 tons more or less" was not a limitation of the quantity to be purchased, but was a discretion left to the plaintiffs that they might not be fettered in obtaining a vessel to carry the quantity ordered; that the letter was therefore simply an order to purchase 500 tons; but that the defendant must be taken to have been giving an order with reference to the circumstances of the Mauritius market; and therefore that each quantity, as it was purchased by the plaintiffs from the several sellers, was purchased on behalf of the defendant; and he was bound to accept and pay for the 400 tons.

DECLARATION, that the plaintiffs were commission agents at Mauritius, and the defendant was a merchant carrying on business in Liverpool, and the defendant employed and instructed the plaintiffs to purchase at Mauritius for the defendant, and to ship the same at Mauritius for him, a large quantity of cane sugar at about a limit given by the defendant to the plaintiffs as the maximum, to wit, 26*s.* 9*d.* for numbers 10 to 12 to cover cost, freight, and insurance; the plaintiffs to provide insurance and draw upon defendant for cost of the said purchase and shipment as customary

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attaching documents; and the defendant then promised the plaintiffs that in consideration of the premises he would accept the said sugar and would give the draft of the plaintiffs for the said cost thereof due protection on presentation thereof; that the plaintiffs did in accordance with the defendant's employment and instruction purchase at Mauritius for the defendant, and did ship at Mauritius for him, a large quantity of cane sugar at and within the limit given by the defendant for numbers 10 to 12 covering cost, freight, and insurance. And the plaintiffs did provide insurance and drew upon the defendant for cost of the said purchase and shipment as customary attaching documents. Averment of conditions precedent. Breach, that the defendant would not accept the sugar, and would not give the draft of the plaintiffs for the cost thereof due protection on presentation, whereby the plaintiffs were compelled at a great loss to take up the said draft and documents attached thereto and to sell the sugars at a great loss.

Fourth plea. That the employment and instruction to purchase and ship for and on behalf and on account of the defendant a large quantity of cane sugar, was an employment to purchase and ship as aforesaid 500 tons, 50 tons more or less of the said sugar, and that, save as aforesaid, the defendant never did employ or instruct the plaintiffs as alleged; and that the plaintiffs never did purchase or ship 500 tons of the said sugar, 50 tons more or less, but only a much smaller quantity, that is to say, 400 tons; and the alleged breach was the defendant's refusal to accept such smaller quantity of sugar, and to give the plaintiffs' draft for the cost thereof due protection on presentation, and to pay for such sugar.

Fifth plea. That the employment and instruction to purchase and ship for and on account of the defendant a large quantity of cane sugar, was an employment to purchase a cargo of cane sugar of 500 tons, 50 tons more or less, and to ship the same at Mauritius in a ship that should call for orders for a good port in the United Kingdom, the defendant to have the option of sending the vessel to London, Liverpool, or the Clyde, and that, save as aforesaid, the defendant never did employ or instruct the plaintiffs as alleged, and that the plaintiffs never did purchase a cargo of 500 tons of the said sugar, 50 tons more or less, but on the contrary thereof only a much smaller quantity, that is to say, 400 tons; and that they never did ship such

smaller quantity in a ship that should call for orders for a good port in the United Kingdom, and never did procure for the defendant the option aforesaid, but contrary to the terms of the said employment and instruction, shipped the same in a ship not calling for orders as aforesaid and without procuring for the defendant any such option as aforesaid; and that the alleged breach was and is the defendant's refusal to accept the said smaller quantity of sugar, and to give the plaintiffs' draft for the cost thereof due protection on presentation to pay for such sugar.

Demurrers to the fourth and fifth pleas and joinder.

Second replication to the fourth plea, that the employment and instruction were given by and contained in a letter written and sent by the defendant to the plaintiffs on the 25th July, 1864, and a telegram despatched on the next day by one D. J. Maitland, on behalf of the defendant to the plaintiffs; and which letter was as follows: "My opinion is, that should the beet crop prove less than usual there may be a good chance of something being made by importing cane sugar at about the limit I am going to give you, as a maximum, say 26*s.* 9*d.* for numbers 10 to 12, and you may ship me 500 tons to cover cost, freight, and insurance, 50 tons more or less of no moment if it enable you to get a suitable vessel. You will please provide insurance and draw upon me for cost thereof as customary attaching documents, and I engage to give same due protection on presentation. I should prefer the option of sending vessel to London, Liverpool, or the Clyde, but if that is not compassable you may ship to either Liverpool or London." And which telegram was as follows: "In writing to Mauritius say Mr. Livingston's insurance is to be done with average, and, if possible, the ship to call for orders for a good port in the United Kingdom." That it was at Mauritius the usual customary and proper course of business in carrying out such instructions as above, to buy such quantities of sugar as were procurable in the Mauritius of divers persons there, and that it was there and then quite impossible to purchase of one seller, or at one time, or by one contract, such a quantity of sugar as in the above letter mentioned; and that it was customary, usual, and necessary for merchants and commission agents employed and instructed to purchase and ship for other persons such a large quantity of sugar as aforesaid, to proceed to purchase

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for and on behalf of such other persons several smaller quantities of sugar from different sellers by several contracts, for the purpose of carrying into execution such employment and instruction, and making up the whole large quantity intended to be purchased and shipped as aforesaid; and that the plaintiffs did, in pursuance of the employment and instruction given by the defendant according to the common course of business and custom in Mauritius, proceed to purchase and did purchase for defendant divers quantities of cane sugar, amounting in the whole to 400 tons, being the sugar in the declaration mentioned, at such a price that at the rate of freight at which shipment was then obtainable the same could be and was shipped at the limits given by the defendant according to the instructions given by the defendant; and though the plaintiffs exercised all due diligence, and did all things on their part to be done in order to complete the purchase and shipment of the whole large quantity of sugar in the above letter mentioned, yet they could not, while shipment was obtainable at the said rate of freight, purchase any further quantity at such a price that the same could be shipped at about the limits given by the defendants, and it became impossible for them, according to the then current prices and rates of freight, to purchase and ship any further quantity than the said 400 tons at about the limits given by the defendant; and the plaintiffs were always ready and willing to purchase and ship for the defendant a further quantity of sugar to make up the quantity in the above letter mentioned, if it should become possible to purchase and ship the same at about the limits given by the defendant within a reasonable time in that behalf; but more than such a reasonable time elapsed before it became possible so to do; and before such reasonable time had elapsed the defendant wrote and sent to the plaintiffs a letter of the 24th September, 1864, to the effect that owing to the change of prices, &c., he preferred doing nothing at present. Wherefore, and by reason of the premises, and not otherwise, the plaintiffs forbore to purchase and ship for and on behalf of the defendant any further quantity of sugar beyond the said quantity of 400 tons; that the above mode of carrying out the said instructions was the usual customary and proper mode of carrying them out at the Mauritius.

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Third replication to the fifth plea: repeating the allegations contained in the preceding replication, that it never was possible for the plaintiffs at about the limits given by the defendant, to procure for the shipment of the said sugar a ship to call for orders for a good port in the United Kingdom, or to procure for the defendant the option of sending the vessel to London, Liverpool, or the Clyde.

Demurrers to the second and third replication and joinder.

Edward James, Q.C. (*Raymond* with him), for the plaintiffs. The terms of the contract between the parties must be gathered from the whole record. This is not a contract between vendor and vendee, but it is an order from a principal to his agent to purchase sugar on his account. No doubt in the case of a contract between a vendor and vendee, the vendee is not bound to accept a less quantity than he bargained for, but that rule has no application to the case of principal and agent. On the construction of the letters and telegram set out in the record, the order was not to purchase an exact quantity. It was to purchase 500 tons of sugar with a discretion as to 50 tons more or less to be exercised according to the means of transport procurable. It must be assumed that the parties to the contract intended it should be executed according to the custom of the country where the purchase was to be made, and it is admitted on the record that it was impossible to purchase the whole quantity within the given limits before the defendant countermanded his order.

The Solicitor General (*Sir W. Bovill*) (*Potter* with him), for the defendant. The contract is that the defendant will accept and pay for a cargo of 500 tons of sugar, to be purchased and shipped by the plaintiffs, 50 tons more or less, at a limited price to cover cost, freight, and insurance. *Cross* v. *Eglin* (1) and *Tanvaco* v. *Lucas* (2) shew that where a limit as to quantity is specified in a contract, the vendee is bound to accept neither more nor less. In the present case there is a written contract, and the usage attempted to be set up is inconsistent with it, and cannot be introduced to vary the contract: *Suse* v. *Pompe* (3); *Trueman* v. *Loder*. (4) The replica-

(1) 2 B. & Ad. 106.
(2) 1 E. & E. 581; 28 L. J. (Q.B.) 301.
(3) 8 C. B. (N.S.) 538; 30 L. J. (C.P.) 75.
(4) 11 A. & E. 589.

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tion does not allege that the defendant had knowledge of the usage, and unless a party to a contract has knowledge of a local usage he is not bound by it: *Kirchner* v. *Venus* (1); *Sweeting* v. *Pearce*. (2)

James, Q.C., in reply. An agent employed to make a contract at a particular place has an implied authority to act according to the usage of that place, and knowledge of the usage on the part of the principal is immaterial: *Sutton* v. *Tatham* (3); *Bayliffe* v. *Butterworth* (4); *Pollock* v. *Stables*. (5)

[COCKBURN, C.J. Ought not the plaintiffs to have brought their action against the defendant for refusing to allow them to complete the contract?]

The principal can revoke the employment, but he is bound to accept the goods bought in compliance with it. By the usage of the place, the plaintiffs bought the sugar from time to time in smaller quantities, and as they bought each quantity it vested in the defendant, and became his property.

[*Potter* pointed out that the contract was for the purchase of sugar at 26*s*. 9*d*. per ton, as a maximum to cover cost, freight, and insurance, and that there could be no appropriation of the sugar by the plaintiffs so as to vest the property in the defendant until these charges had been ascertained.]

COCKBURN, C.J. I am of opinion that our judgment should be for the plaintiffs. I should be very loth to cast a shadow of a doubt on the correctness of the decision of *Tanvaco* v. *Lucas* (6), and if the limitation stated in this contract had been a limitation as to quantity, that case would have been an authority directly in point. I agree with Mr. James's construction of the contract, that the limitation "50 tons, more or less, of no moment," is not intended as a limitation of the quantity which the plaintiffs were authorized to buy on behalf of the defendant, but simply was intended to prevent the plaintiffs being fettered in executing the order, in the event of their finding a ship of greater or less capacity than the

(1) 12 Moore P. C. 361.
(2) 9 C. B. (N.S.) 534; 30 L. J. (C.P.) 109.
(3) 10 A. & E. 27.
(4) 1 Ex. 425.
(5) 12 Q. B. 765.
(6) 1 E. & E. 581; 28 L. J. (Q.B.) 301.

precise quantity of 500 tons. So that if the plaintiffs had happened to find a vessel capable of carrying 450 tons only, they would not have been wanting in the due discharge of their obligation as agents, by sending the lesser quantity, even although they had been able to buy 500 tons. On the other hand, if they could only have found a vessel capable of carrying 550 tons, then their authority was to be extended beyond the 500 tons, so as to enable them to buy the quantity necessary to fill such a vessel. Therefore, I think we may read this contract, as far as the quantity to be purchased is concerned, as if the words "50 tons, more or less," were not in it. It would then be an order to purchase sugar to the extent of 500 tons. I think that must be taken to mean an authority to buy sugar not exceeding 500 tons.

Now, the replications set forth certain facts, which, for the present purpose, must be taken to be admitted; and it is stated that according to the ordinary course of dealing in the island of Mauritius, where this contract was to be fulfilled by the plaintiffs, it was impossible to buy so large a quantity as 500 tons at once, or of one and the same seller, and it was necessary to buy by instalments, and that in order to obtain the whole quantity, time was necessary. It is further alleged that the plaintiffs, having bought 400 tons of the quantity to which their authority extended, had not had sufficient time reasonably to complete it, so as to purchase the whole, but they were in the course of completing the employment which they had taken upon themselves, and were ready and willing to go on and fulfil their obligation to its full extent, when they were interrupted, and their authority to proceed further countermanded by the act of the defendant. Mr. James has contended that the plaintiffs were entitled, this being the state of things, and these being the only conditions upon which they could fulfil their engagement, as they bought successive quantities of the sugar in order to make up the 500 tons, to appropriate what they bought to the defendant, so as to make it obligatory on the defendant to take it. Mr. Potter interposed, and put a very pertinent point, namely, that that appropriation could not take place until the plaintiffs had ascertained that the freight with the insurance and the cost price would not exceed the maximum. There seemed at first to be some force in that

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objection; but I think, when the matter comes to be considered, it amounts only to this:—The plaintiffs had the authority to buy, provided the cost price, the insurance, and the freight, did not exceed the maximum of 26*s.* 9*d.* No doubt they would not be entitled to claim at the hands of the defendant more than that maximum price, but it was their business to keep within it; and if they choose to purchase, being confident, looking at the price at which they bought, looking at the rate of freight and insurance, that they could keep within the maximum, I see nothing to prevent them from appropriating, as they purchased in successive lots, the sugar which they bought on behalf of the defendant. I think their authority being to buy 500 tons, that the moment they were stopped in fulfilling the terms of the engagement with the defendant, they had a perfect right to say, "We have been buying sugar under your authority to the extent of 500 tons, we have bought 400 tons for you, and have appropriated it to you; if you prevent us from getting more, you must take that which we have bought for you."

MELLOR, J. I am of the same opinion. I think that the conclusion at which we arrived does not conflict with any of the cases cited by the Solicitor General. The plea sets out that the employment and instruction by the defendant to the plaintiffs was to purchase and ship for the defendant 500 tons, 50 tons more or less, and omits those qualifying words which give quite a different construction to the contract, when it is set out in full in the replication. So long as I was under the impression that the words "50 tons more or less" were to be read as expressing the limits within which the defendant was to have this transaction completed by the plaintiffs, I thought there was great difficulty in the way of the plaintiffs recovering; but when the language with which those words are connected is looked at, it is clear that the effect is to limit the purchase to 500 tons, and the words "50 tons more or less of no moment, if it would enable you to get a suitable vessel," apply to the obtaining a vessel of the requisite capacity. This being the contract, the plaintiffs state in their replication the circumstances under which the contract was to be performed in the island of Mauritius, that reasonable time was requisite, looking to

the mode in which the transactions are necessarily conducted in the island for the purchase of sugar, and they say that before a reasonable time elapsed, although they were ready and willing and used all due diligence in order to complete the contract for the entire purchase of the 500 tons of sugar, the defendant revoked the authority, and desired them not to buy any more,—in point of fact, prevented them from completing the contract. In the meantime the plaintiffs had purchased 400 tons, which we must assume had been purchased within the limits prescribed by the letter of instructions; and, if so, each successive purchase became appropriated to the defendant. I was struck with the suggestion which my Lord threw out as to the form of the declaration. I have, however, come to the conclusion that it is sufficient. I am of opinion, upon the whole record, that the plaintiffs are entitled to our judgment.

SHEE, J. I agree with what has been said by my Lord and my Brother Mellor, that the words "50 tons more or less" have reference to the advantage of getting a suitable vessel, and I take the words of the contract to mean an order to purchase up to 500 tons. It is contended on behalf of the defendant that the order was to purchase 500 tons, and that as the plaintiffs have not purchased that quantity he is not liable. No doubt the order was to purchase 500 tons, but it was an order given by the defendant to the plaintiffs to act as his agents at the Mauritius in the purchase of the sugar, and every one who employs an agent to purchase goods for him at a particular market must be supposed to be dealing with regard to the usages of that market; as laid down by Alderson, B., in *Bayliffe* v. *Butterworth* (1), "a person who deals in a particular market, must be taken to deal according to the custom of that market and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place." Now according to the usage of the Mauritius market it was impossible for the plaintiffs to buy the sugar in one lump; the only mode in which they could execute the order was to buy from time to time a parcel from one man and another parcel from another: 400 tons were bought in that way and before a reasonable time had elapsed to enable the plaintiffs to

(1) 1 Ex. at p. 429.

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buy the remainder, the order was countermanded; what was bought was bought on account of the defendant, and the usage of the market being admitted in these pleadings, the defendant ought to receive the sugar and pay for it.

Judgment for the plaintiffs. (1)

Attorneys for plaintiffs: *Francis & Bosanquet.*

Attorneys for defendant: *Uptons, Johnson, & Upton, for Lowndes & Co., Liverpool.*

Dec. 22.

COBBETT, EXECUTOR, &c. *v.* WARNER.

Practice—Action—Staying Proceedings till Costs of former Action paid.

9 QBD 92

Where a plaintiff having failed in an action brings a second action for substantially the same cause, unless the plaintiff satisfy the Court that a real probable cause of action exists, the proceeding is so primâ facie vexatious and harassing that the Court will stay the second action until the costs of the former action have been paid.

The plaintiff brought an action of ejectment to recover tollgates, &c., as executor of a mortgagee of the tolls of a turnpike road, in order to enforce payment, but was unable to produce the mortgage deed, or prove the loss of it so as to give secondary evidence; and he was accordingly nonsuited. He admitted at the trial (as the fact was) that the testator had been bankrupt. After the trial the trustees of the road obtained a new act of parliament, and inserted the testator's name in a schedule as a mortgagee. The plaintiff then brought an action against one of the trustees, claiming a mandamus commanding the trustees to execute a fresh mortgage to the plaintiff as executor. Since the first action the plaintiff had become a bankrupt.

The Court were of opinion that the two actions were substantially the same, and that under the peculiar circumstances of the case the second action was vexatious, and stayed the proceedings till the costs of the action of ejectment had been paid.

RULE calling on the defendant to shew cause why an order of Blackburn, J., staying proceedings in this action until the defendant's costs of a former action between the plaintiff and Thomas Wheeler and others should have been paid, should not be set aside.

It appeared from the affidavits that the plaintiff, as executor of his father, William Cobbett, brought an action of ejectment to recover possession of the tollgates, &c., of a turnpike road called "The Winchester Road," in order to enforce a mortgage of 500*l.*

(1) See *Johnston* v. *Kershaw*, Law Rep. 2 Ex. 82.

and interest, which the plaintiff alleged his late father had on the trust. The action being brought against the tollgate keeper, &c., John Jenkyns, one of the trustees, was let in to defend as landlord. On the trial before Crowder, J., at the Hampshire spring assizes, 1856, the plaintiff did not produce the mortgage deed, which he alleged had been destroyed by fire in America, but he was unable to prove the loss. The plaintiff also admitted (as was the fact) that his father had been a bankrupt, but no formal evidence of this was given. The plaintiff was nonsuited, on the ground that he had failed to prove his title, and judgment was signed by the defendant, and the plaintiff was arrested, under a ca. sa., for the costs; and remained in custody until he was adjudged a bankrupt as a prisoner for debt, and released under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 101.

In 1862 the trustees of the Winchester Road obtained a new act of parliament (25 Vict. c. xii.) for the purpose inter alia (by s. 4) of discharging the debts specified in the schedule to the act; and in that schedule was inserted the name of William Cobbett as a mortgagee for 450*l*. The plaintiff then brought a fresh ejectment, and the present action, under the General Turnpike Act, 3 Geo. 4, c. 126, s. 74, against the defendant as one of the trustees of the Winchester Road, claiming a mandamus under the Common Law Procedure Act, 1854, s. 68, commanding the trustees to execute to the plaintiff as executor a new mortgage of the tolls, in pursuance of 9 Geo. 4, c. 77, s. 13, and damages for refusing to execute such mortgage when required to do so before the first action of ejectment, whereby the defendant was nonsuited in that action.

The proceedings in the ejectment had been stayed under section 93 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125); and Willes, J., had made an order under that section staying the present action also until security was given for costs; but the Court (May 24, 1866) held that there was no ground for making that order, and set it aside; whereupon the present order was obtained.

Nov. 8. *H. T. Cole* shewed cause. The plaintiff in the present action will have to prove his title to the mortgage deed as strictly as he would have to do to enable him to recover in the

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action of ejectment; the evidence in both actions would be the same, and if the plaintiff were allowed to proceed he would by changing the form of action evade the order staying proceedings in the action of ejectment. The facts shew that the present action is vexatiously brought. The order, therefore, was rightly made

The Plaintiff in person contended—First, that the causes of action in the two actions were not identical; secondly, that the mortgage debt due to W. Cobbett had not passed to his assignees. He cited *South Staffordshire Railway Company* v. *Burnside* (1); *Pardoe* v. *Price.* (2)

Cur. adv. vult.

December 22. The following judgments were delivered:

MELLOR, J. I proceed to deliver the judgment of my Brothers Blackburn, Lush, and myself.

In this case a rule has been obtained to set aside an order of Blackburn, J., staying proceedings in this action until the plaintiff pays the costs of a former action of *Cobbett, Executor* v. *Wheeler and Others.* The Court, undoubtedly, has jurisdiction to prevent the abuse of its process by bringing vexatious actions. This summary jurisdiction should be sparingly exercised, as it deprives the party whose action is stopped of the right to try his cause, and if necessary to carry it to the highest tribunal. It has, however, generally been exercised, where the party has previously failed in the course of litigation, and then without paying the costs of the former action has brought a fresh action against the same party, or some one identified in interest with him, for the same, or what is substantially the same, cause of action. In such cases the Court will interfere to prevent him harassing his opponent, and will stay the proceedings till the costs of the former litigation are paid: *Hoare* v. *Dickson.* (3) We wish to guard against being supposed to lay down a general rule, that this course is to be adopted whenever costs of a former litigation are unpaid; but we think that where that is the case, and the plaintiff fails to satisfy the Court, that there is a real probable cause of action though he failed to

(1) 5 Ex. 129; 20 L. J. (Ex.) 120. (2) 13 M. & W. 267.
(3) 7 C. B. 164, 177; 18 L. J. (C.P.) 158.

establish it in the former litigation, the proceeding is so primâ facie vexatious and harassing that the Court ought to interfere to stop it till the former costs have been satisfied.

Now applying this principle to the present case, we think that the order was properly made.

It appears, by the affidavits, that the plaintiff brought an action of ejectment which was defended by one of the trustees of the Winchester Road. At the trial the plaintiff conducted his own case which he rested on this, that his late father, William Cobbett, had been a mortgagee of the turnpike tolls for 500*l.*, and that he was his executor and representative. The defendant required him to prove his father ever had been a mortgagee; this the plaintiff was unable to do; and the defendant also set up as a further defence that the late Mr. Cobbett had become bankrupt, and that consequently all his interest in the 500*l.* and in the security had vested in his assignees. The plaintiff, both at the trial and on the argument before us, admitted that his father had become bankrupt, but set up some answer—probably satisfactory to his own mind, but which he failed in making intelligible to us—to the effect that the property was still in him as the representative of his bankrupt father.

He was nonsuited on the trial, but, unluckily, the nonsuit seems to have proceeded rather on the technical, though sufficient, ground that he had failed to prove that his father ever had any mortgage, than on the real defence, that what he once had had passed from him and could not vest in the plaintiff.

Since that time the trustees, having obtained a fresh turnpike act, have given a list of their original mortgagees in the schedule to that act, and amongst them is mentioned William Cobbett for 450*l.*; and thus they have admitted that on the technical point on which the plaintiff was nonsuited he was in fact right, though he could not prove it. But there is nothing in the affidavits to shew that the other ground on the merits was not perfectly sufficient to bar the plaintiff. He thinks otherwise, and if he pays the costs he may raise the question; but we think that we ought not to permit him to harass the trustees by raising the same question again against them until he has done so.

Now the present action differs in form from the former, but we

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think it is, in substance, against the same parties and for the same object. It is against a different person, but he is a trustee of this road, and he is sued as a trustee of this road. It is in form a demand of a writ of mandamus to compel the trustees to give to the plaintiff a fresh mortgage in lieu of the former one originally granted to his father, which has been lost. The plaintiff is not entitled to this unless he proves that he is the person at present entitled to that mortgage: he must, to raise a primâ facie case for this purpose, prove exactly what he would have to prove in order to make a primâ facie case if he brought a fresh action of ejectment, and every answer which would defeat him in an action of ejectment would also be an answer to this claim. And if he succeeded here, it would be to all intents and purposes the same thing as succeeding in the ejectment. The trustees, by granting a fresh mortgage to the plaintiff himself, would put him in the same position as if he had recovered in an action of ejectment. It would be equivalent to confessing judgment in the action. The proceeding is ancillary to an action similar to that in which the plaintiff has already failed; and he has not shewn any case to rebut the primâ facie presumption that it is vexatious and harassing to bring this action until he has satisfied the costs of the former litigation.

We think, therefore, that the order was right, and that the rule should be discharged.

COCKBURN, C.J. I wish it to be understood that, in assenting to this judgment (and I assent not without considerable reluctance and doubt), it is only upon the very special circumstances of the present case. The plaintiff was defeated in the former action of ejectment, because he could neither produce the original mortgage to his father nor put himself in a position to give secondary evidence of it. That the father was a mortgagee is now put beyond doubt by the fact that the trustees of the road, on obtaining a fresh act of parliament, inserted the name of the late Mr. Cobbett in the list of mortgagees. If in the present case the facts were simply that the plaintiff sought by this action to put himself in a position to maintain a second action of ejectment by compelling the mortgagees to execute a fresh mortgage, it is not because the

present action would thus be ancillary to a second action of the same nature as the first, that I think the proceedings ought to be stayed. The ground on which I concur in discharging this rule is, that it already appears, from what has been proved or admitted in the course of the discussion of this case, that the trustees are placed in a position of considerable difficulty. Although primâ facie they would be bound to give the plaintiff a fresh mortgage, yet, as there have been two bankruptcies, that of the father and also of the plaintiff himself, it may be that, if the mortgagees were to grant him a new mortgage, they might find themselves exposed to a like claim from the assignees in both bankruptcies, and the trustees might thus be put in a position of extreme hardship. No doubt, it may be said, that the question might be raised in this action, on proper pleadings, ay or no, is the plaintiff entitled, as he says he is, in some way or other, to what he claims, or is he barred by both or either bankruptcy? But the plaintiff would have all the same advantages in a fresh action of ejectment, so that, substantially, the two proceedings are the same; as the present action cannot be of any use without a second ejectment. If the plaintiff had shewn that there was no defence to the action, that would have been another matter. On the whole, therefore, I have come to the conclusion, though not without hesitation, that, under the very special circumstances of the case, this action may be considered as vexatious, and ought not to be proceeded with until the costs of the former action have been paid; and that the order was right, and this rule should be discharged.

Rule discharged.

Attorneys for defendant: *Wood, Street, & Hayter.*

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Nov. 22.

Ex Parte VAUGHAN.

Jurisdiction of Justices—Claim of Title—Parish Property, Warrant for Possession of—59 Geo. 3, c. 12, s. 24.

In a proceeding to recover possession of a house alleged to belong to a parish, under 59 Geo. 3, c. 12, s. 24, the jurisdiction of the justices is not ousted by a claim of title, as the question of title is necessarily involved in the matter which the justices have to determine.

This was an application for a writ of certiorari to remove into this court an order made by two justices of the county of Brecon, under s. 24 of 59 Geo. 3, c. 12 (1), against J. Morgan, and also a

(1) Section 24 of the 59 Geo. 3, c. 12, enacts: "And whereas difficulties have frequently arisen, and considerable expenses have sometimes been incurred, by reason of the refusal of persons who have been permitted to occupy, or who have intruded themselves into, parish or town houses, or other tenements or dwellings, built or provided for the habitation of the poor, or otherwise, belonging to such parishes, to deliver up the possession of such houses, tenements, or dwellings, when thereto required; and it is expedient to provide a remedy for the same: be it further enacted, that if any person who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to, or provided by, or at the charge of, any parish, for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, tenement, or dwelling, or into any house, tenement, or hereditament belonging to such parish, shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after notice and demand in writing for that purpose, signed by such churchwardens or overseers, or the major part of them, shall have been delivered to the person in possession, or in his or her absence affixed on some notorious part of the premises, it shall be lawful for any two justices of the peace, upon complaint to them made by one or more of the churchwardens and overseers of the poor of the parish in which any such house, tenement, or dwelling shall be situated, to issue their summons to the person against whom such complaint shall be made, to appear before such justices, at a time and place to be appointed by them, and to cause such summons to be delivered to the party against whom the complaint shall be made, or in his or her absence to be affixed on the premises, seven days at the least before the time appointed for hearing such complaint; and such justices are hereby empowered and required, upon the appearance of the defendant, or upon proof on oath that such summons hath been delivered or affixed as is hereby directed, to proceed to hear and determine the matter of such complaint; and if they shall find and adjudge the same to be true, then, by warrant under their hands and seals, to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish, or to some of them."

warrant under their hands authorizing the persons mentioned in it to turn John Williams out of possession of the tenement in the order mentioned.

It appeared from the affidavits that one John Morgan was in possession of a cottage and two gardens and a plot of land, which the parish officers of Llanfillo claimed as parish property; and on the 12th of March, 1866, they gave Morgan a notice in writing, under s. 24 of 59 Geo. 3, c. 12, to deliver up possession of the property.

William Vaughan claimed to be the owner in fee of the cottage and land as the purchaser from one Burgess, who was devisee under the will of one Charles Vaughan the younger, who had occupied the cottage for fifty-five years, and who had obtained possession from his father, Charles Vaughan the elder.

Charles Vaughan the elder had been parish clerk of the parish of Llanfillo, and it was alleged, on behalf of the parish officers, that he was permitted to occupy the premises in consideration of his services as clerk; and it was also alleged that Charles Vaughan the younger, while in occupation of the premises, had admitted that they were parish property.

William Vaughan had let the cottage and land to Morgan, and when Morgan was served with the notice, obtained possession of the premises from him, and let them to one John Williams, who entered into possession on the 2nd of April. On the 4th of April, Morgan was summoned under the same statute for refusing to give up possession: he failed to attend, and a warrant was issued, by virtue of which John Williams was ejected from the premises, and the parish officers put in possession.

Vaughan, in his affidavit, stated that J. Morgan had informed him that he had been served with the summons of the 4th of April, but as he, Vaughan, had purchased the property and was in possession by his tenant Williams, he had treated the summons as a nullity.

An application had been made to a judge at chambers for a writ of certiorari and refused, leave being granted to apply to the Court, cause to be shewn in the first instance.

H. Matthews, in support of the application. The statute 59 Geo. 3,

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c. 12, s. 24 (1), gives power to justices to dispossess two classes of persons, those who have been permitted to occupy houses provided for the habitation of the poor, or those who have intruded themselves into such houses: *Reg.* v. *Justices of Middlesex.* (2) Here Morgan was the tenant of Vaughan, and Vaughan claimed the premises as his freehold; title having come into question, the justices' jurisdiction was ousted.

[LUSH, J. This point has been decided in *Reg.* v. *Bolton.* (3) Whether the house was a parish house or not was the very question the justices had to decide. Primâ facie, therefore, they have jurisdiction; at what time of the inquiry do they lose jurisdiction?]

Directly the question of title is raised. In Paley on Convictions, 4th ed. 117, it is laid down: "It has always been held as a maxim, that where the title to property is in question, the exercise of a summary jurisdiction by justices of the peace is ousted." It is also now clearly established that a magistrate or county court judge cannot give himself jurisdiction by erroneously deciding that the matter on which he adjudicates is within his jurisdiction: *Thompson* v. *Ingham* (4); *Reg.* v. *Dayman.* (5) He also referrred to *Reg.* v. *Evans.* (6)

H. James appeared to shew cause in the first instance. He pointed out that the passage read from Paley on Convictions did not apply to cases where the title is the very essence of the inquiry.

COCKBURN, C.J. Where the title to property comes into question, no doubt the jurisdiction of justices is ousted, but that doctrine cannot apply to cases where the title is an essential element in the inquiry which the justices have to determine. I am very far from saying that where certain facts have to be proved to justify the magistrates in issuing a warrant, and they act without evidence, the Court would not control the exercise of their authority; but where a fact is to be proved which is the very essence of the inquiry, and there is evidence before the justices on the one side and the other, the Court will not, although they may think that upon the evidence the justices have come to a wrong conclusion, interfere

(1) See note, p. 114.
(2) 7 Dowl. 767.
(3) 1 Q. B. 66.
(4) 19 L. J. (Q.B.) 189.
(5) 7 E. & B. 672; 26 L. J. (M.C.) 128.
(6) 19 L. J. (M.C.) 151.

to review their decision. In all cases in which justices have to decide a collateral matter before they have jurisdiction, and they give themselves jurisdiction by finding facts which they are not warranted in finding, the Court will review their decision, and, if they have improperly given themselves jurisdiction, will set aside the proceedings; but where the question is a material element in the consideration of the matter they have to determine, and they, exercising their judgment as judges of the fact, have decided it on a conflict of evidence, it is contrary to our principle and practice to interfere. This is consistent with the judgment of the Court in the case of *Reg.* v. *Bolton* (1) It was there decided that, where the question was one of fact for the justices, and evidence was given on the one side and the other, the decision of the justices was final; and I think it is upon the principle upon which that case was decided that we ought to proceed when called upon to review the decision of justices.

MELLOR, J. I am of the same opinion. I think the question depends on what the statute describes as constituting the offence: for instance, in the case before us the words of the statute are: "If any person who shall have been permitted to occupy any parish or town house;" now, here the magistrates must ascertain and determine as an essential ingredient in the case whether the house is a parish or town house within the meaning of the section. There was evidence on which the justices might come to a conclusion in the affirmative. I think we cannot interfere, because the evidence preponderated on one side. If there was evidence to found jurisdiction, and the question of title is a necessary ingredient in the inquiry, the justices must go on and determine the question of title; but that is distinguishable from the case in which a limited jurisdiction depends on the finding of facts: there we always act upon the rule that the justices cannot give themselves jurisdiction by an erroneous finding. *Reg.* v. *Dayman* (2) proceeded on the ground that it was an essential matter to be determined, whether the street in question was a new street or not. The cases are numerous that, where by the decision of a collateral fact the justices give themselves jurisdiction and their decision is erroneous, the Court will review it, but that

(1) 1 Q. B. 66. (2) 7 E. & B. 672; 26 L. J. (M.C.) 128.

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is not this case; whether the house is a parish house or not, is a question necessarily involved in the matter which the justices have to determine. I therefore think we cannot interfere with their finding, even if they came to an erroneous decision on the evidence.

SHEE, J. I am also of the same opinion. The object of the act of parliament is to provide a summary remedy for the great inconvenience caused by persons who have been occupying parish houses, or persons who have intruded into such houses, continuing in possession after the overseers have given them a notice to quit. For remedying this evil, the statute provides that the overseers, after they have given a month's notice, shall make complaint to the justices, and the justices shall be empowered to require the appearance of the defendant, and upon proof on oath that such summons has been served, to proceed to hear and determine the matter of such complaint. There can be no complaint at all, unless the house which the person whom it is sought to eject was occupying or had intruded into, was parish property. Therefore, whether the house was a parish house or not, was a matter to be inquired into and determined by the justices. From that decision there can be no appeal, for an appeal would frustrate the object of the statute, which was to provide a summary remedy by an application to the justices. I cannot distinguish this case from *Reg.* v. *Bolton* (1), in which it was decided, under this statute, that if there was evidence before the justices on which they might arrive at the conclusion that a house was a parish house, the Court ought not and would not interfere with their decision, although it might not be wholly satisfactory. If there was no evidence at all upon which the justices could adjudicate, then they would be acting improperly, but here they have arrived at a decision on the evidence before them, and we cannot interfere.

LUSH, J. I am of the same opinion. The information is not before us, but I presume it contains a statement which on the face of it brings it within s. 24. If so, it would contain a complaint of the defendant having been permitted to occupy a parish house, or having intruded himself into a parish house; due notice given him to quit, and a refusal to give up possession. The justices were

(1) 1 Q. B. 66.

bound to inquire into every one of those allegations, and affirm or disaffirm each of them. They acted upon the belief that they were all true. No appeal is given in the statute, neither is there any provision similar to that in the statute under consideration in *Thompson* v. *Ingham.* (1) This case is within the principle laid down in *Reg.* v. *Bolton.* (2) In a considered judgment the Court say: "Where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry; in so doing he undoubtedly acts within his jurisdiction: but in the course of the inquiry evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and *so* that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of shewing this is clearly in effect to shew that the magistrate's decision was wrong if he affirms the charge and not to shew that he acted without jurisdiction: for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that, if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence." And the Court go on to say: "Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits to be receivable must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry." Every word of that seems to me to be strongly applicable to the present case, therefore I agree with the rest of the Court that the rule ought to be refused.

COCKBURN, C.J. As counsel appeared to shew cause in the first instance by the direction of the judge at chambers, we give the costs of shewing cause.

Rule refused, with costs.

Attorneys for applicant: *Hollings, Sharpe, & Ullithorne.*
Attorneys for defendants: *Robinson & Geare.*

(1) 19 L. J. (Q.B.) 189. (2) 1 Q. B. at p. 73.

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Nov. 27.

ELLIOTT *v.* JOHNSON.

Landlord and Tenant—Yearly Tenancy, assignment of—Privity of Contract —Action by Assignee.

9 QBD 370

The defendant demised a farm for a term of fourteen years; the lease contained a covenant by the lessees not to assign without licence, with a proviso for re-entry, and a covenant by the lessor at the expiration of the tenancy to pay for certain things at a valuation. At the expiration of the term, the lessees continued tenants from year to year on the terms of the original lease. They afterwards, by deed, assigned their interest in the premises, with their right to be paid for the things at a valuation, to the plaintiff. The plaintiff entered into the occupation of the premises, but never paid rent; nor did the defendant ever recognise him as his tenant. The defendant gave the lessees the proper six months notice to quit, and the plaintiff gave the defendant a similar notice:—

Held, that the plaintiff could not maintain an action against the defendant for the amount of the things at a valuation.

Per Mellor and Lush, JJ., on the ground that no new tenancy had been created between the plaintiff and defendant, and that the bare assignment of the parol tenancy did not pass to the assignee a right of action upon the special stipulation.

Per Shee, J., on the ground that as the lessees had no power to assign without licence, they could not transfer any interest in the premises to the plaintiff.

Special Case, stated after issue joined.

The action was brought to recover the sum of 451*l.* 12*s.* 10*d.*, the amount of the valuation of the outgoing tenant's interest in a farm of the defendant.

By an indenture of lease made on the 1st of March, 1832, between the defendant of the one part and T. & W. Elliott of the other part, the defendant demised the farm in question to T. & W. Elliott for the term of fourteen years, from the 29th of September, 1831, at the yearly rent of 120*l.* The lease contained a proviso, that if the lessees should assign over the indenture of lease during the demise to any person without the licence of the defendant, under his hand and seal, it should be lawful for the defendant to re-enter upon the demised premises, as on his first or former estate, and the indenture and every clause in it should be then utterly void and of none effect. The lease also contained a covenant by the lessees that they would not assign over, without the licence in writing of the defendant, and also a covenant by the defendant that the lessees should, at the termination of the demise, be paid for certain things at a valuation.

After the expiration of the term granted by the lease, T. & W. Elliott continued to occupy the farm, as tenants to the defendant from year to year, upon the terms of the lease, no fresh arrangement having been made. On the 12th of March, 1864, T. & W. Elliott by deed assigned the whole of their real and personal estate, including all their farming stock, valuations, seeds, and stock-in-trade, to the plaintiff.

On the same day, they executed a deed of composition with their creditors, to pay them four shillings in the pound, the amount of the composition money to be raised and provided by a sale of their joint estate to the plaintiff.

On the 18th of March, 1864, the defendant gave T. & W. Elliott a notice to quit the farm on Michalmas-day next ensuing: at the time of giving this notice the defendant had no knowledge of the execution of either of the deeds. This notice the solicitor of T. & W. Elliott accepted for them.

On the 22nd of March, 1864, the same solicitor, acting for the plaintiff, wrote to the defendant, giving him notice that the plaintiff would quit the farm, which he held of the defendant as assignee of T. & W. Elliott, on the 29th of September, 1864, and stating that he accepted service of the notice to quit given by the defendant, not only for T. & W. Elliott, but also for the plaintiff, and requesting an acknowledgment of his letter, which the defendant accordingly sent him. After the assignment, the plaintiff took possession of the farm, and continued to carry it on until the expiration of the notice, but the defendant did not know in what right the plaintiff had such possession, except, so far as appears from the letter of the 22nd of March. The plaintiff appointed a valuer to value the outgoing tenant's rights on his behalf, and gave the defendant notice of the appointment. The defendant appointed a valuer on his behalf, but expressly without prejudice to the rights of either party. The amount of the valuation was 451*l.* 12*s.* 10*d.* The plaintiff has not paid any rent to the defendant, and no rent has been paid to the defendant since he has had notice of the assignment of the term.

The defendant refuses to pay the amount of the above valuation to the plaintiff on the ground that the assignment to him of the term and interest of T. & W. Elliott was not a valid assignment

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as against the defendant, and did not transfer their interest in the farm to the plaintiff, and that the plaintiff never became the tenant of the defendant, or entitled to the valuation, and that the tenant's right to the valuation became forfeited by the assignment.

The plaintiff contends that the term and interest of T. & W. Elliott was vested in him at the time it expired, and that therefore he was entitled to the amount of the valuation.

The question for the opinion of the Court was, whether or not the plaintiff was entitled to recover from the defendant the amount of the valuation, the Court being at liberty to draw such inferences of fact as a jury might draw.

Raymond, for the plaintiff. The original lessees have assigned their interest to the plaintiff, with the right of possession, and all its incidents, including the right to be paid for the valuations. This assignment was voidable only, and not void. By the letter of the 22nd of March, the defendant was informed that the plaintiff claimed possession as assignee of the term. The assignment having been made without the landlord's consent, he had a right to enter and eject the plaintiff; but he stood by and allowed the tenancy to be determined in accordance with the notice to quit. The plaintiff, therefore, is clearly entitled to the amount of the valuations.

[LUSH, J. What privity is there between the plaintiff and defendant? To entitle the plaintiff to recover he must shew a new tenancy created by payment of rent or some act of recognition.]

That is unnecessary; the entire interest passes by operation of law.

[LUSH, J. The benefit of a stipulation in a parol lease does not pass to the assignee. The statute 32 Hen. 8, c. 34, only applies to leases by deed: *Standen* v. *Christmas*. (1)]

That statute only applies to the assignment of reversions. The plaintiff is the assignee of the term, and claims the benefit of the stipulation at common law.

[LUSH, J. In *Buckworth* v. *Simpson* (2) it was held that the assignee of a term was liable for the non-repair of the premises, on the ground that a new tenancy was created between the parties.]

In that case it was sought to make an executor personally liable,

(1) 10 Q. B. 135. (2) 1 C. M. & R. 834.

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and it was therefore necessary to shew the existence of a new tenancy; but here the old tenancy still exists, and has been assigned to the plaintiff, who can assign it to any one he pleases, even to a pauper: *Taylor* v. *Shum.* (1) The stipulation as to the valuation is like a stipulation against taking successive crops of corn, which in *Doe* v. *Amey* (2) was held not to be inconsistent with a yearly tenancy.

Hannen (*A. L. Smith* with him), for the defendant. The plaintiff, in order to succeed, must make out a contract, express or implied, to pay him for the valuations. Where the circumstances shew that the landlord has in effect recognised the assignee as his tenant, an inference may be drawn that a new tenancy has been created subject to the terms of the original holding; but the law will not impose a contract on a person against which he has always protested. The defendant gave the notice to quit to the original lessees without any knowledge of the assignment, and a valid notice to quit having been given, the defendant was not bound to enter for the forfeiture. No doubt, if a new tenancy had been created by implication of law, it would have amounted to a surrender of the old tenancy; but here the facts negative any intention on the part of the defendant to accept the plaintiff as his tenant.

Raymond, in reply. There is no difference between the rights and liabilities of the assignee of a lease by parol and a lease by deed. The tenant, by assigning, cannot make the lease void; the landlord might have enforced the clause as to forfeiture; he did not; the assignment is therefore valid as against all parties: *Robinson* v. *M'Donnell* (3); *Doe* v. *Roberts* (4); *Bessey* v. *Windham.* (5) The assignor is estopped from saying that, as against him, the deed is invalid: *Arnsby* v. *Woodward.* (6)

[LUSH, J. Can the original lessees sue for the valuations?]

Before the assignment they could, but it would be a good plea to allege that they had assigned their interest.

LUSH, J. Only if the tenancy were created by deed, not if it were a parol tenancy. In the case of the *Marquis Camden* v. *Batterbury* (7) the Court decided that the assignee of an agreement

(1) 1 B. & P. 21.
(2) 12 A. & E. 476.
(3) 2 B. & A. 134.
(4) 2 B. & A. 367.
(5) 6 Q. B. 166.
(6) 6 B. & C. 519.
(7) 7 C. B. (N.S.) 864; 28 L. J. (C.P.) 335.

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under seal by the owner of the soil to grant a lease, was not liable to be sued, because the agreement, not amounting to a demise of the land, could not be assigned, and there was no evidence of a new contract between the owner of the soil and the assignee.]

There the assignor never had become a tenant, here the assignors were clearly yearly tenants.

MELLOR, J. I am of opinion that our judgment must be for the defendant. The facts appear to be these: A lease for a term of years was granted by the defendant to Messrs. Elliott; the lease contained a stipulation that the tenants should not assign without their landlord's consent, and in the event of their assigning the landlord might enter and take possession; there was also a stipulation that the landlord should at the expiration of the term pay for certain things at a valuation. After the lease had expired Messrs. Elliott continued in possession, and became tenants from year to year, subject to the stipulations of the lease, so far as they were applicable to the new relation, while they were tenants from year to year. It was contended on behalf of the plaintiff that Messrs. Elliott, against the will of their landlord and without any act of recognition on his part, could assign their interest in the tenancy, and the assignee would become a tenant of the original landlord and entitled to the benefit of the stipulations contained in the original lease. I think this cannot be. At common law a chose in action is not assignable; and on an assignment of a lease only such things would pass as are essentially inherent in the tenancy itself. The question is, whether or not by the mere force of the assignment a liability is created as between the landlord and the assignee to pay according to the stipulation in the lease for the things at a valuation. I am of opinion no such liability arises. I know of no case which would support the plaintiff's contention; but it would seem to follow from *Buckworth* v. *Simpson* (1) that some act, such as payment and acceptance of rent, must occur in order to create a binding tenancy between the plaintiff and defendant. I think in this case if the landlord had done any act to shew that he accepted the assignee as his tenant, then a new tenancy would have been created on the terms of the old tenancy

(1) 1 C. M. & R. 834.

between the defendant and Messrs. Elliott; but without some act done it appears to me to be contrary to every principle of law to assume that there is a liability which the assignee could enforce as between himself and the original landlord. There is another point in the case, but upon that I do not think it necessary to give any opinion. Upon the short ground, that as the defendant has done no act to shew that he assents to the plaintiff taking possession as a tenant from year to year upon the terms upon which the tenant who assigned to him held the premises, I think the plaintiff is not entitled to recover in this action.

SHEE, J. In this case the original lessees, Messrs. T. & W. Elliott, held the land, in respect of which valuations are claimed from the defendant under a lease dated 1832, for the term of fourteen years. That lease contained two covenants, which it is necessary to advert to; one, that at the expiration of the tenancy the defendant should pay the lessees for certain things at a valuation; the other, that they should not assign without the licence in writing of the defendant. At the expiration of the fourteen years the lessees continued tenants from year to year on the terms of the original lease, so far as they were applicable to a yearly tenancy. That went on until the year 1864, when, getting into difficulties, they assigned all their interest in the premises then in their occupation, and all the property upon them, and specifically their right to the valuations, to the present plaintiff, and by a deed of the same date that assignment appears to have been for the benefit of creditors. Under that assignment the plaintiff entered, and it does not appear that the defendant did anything to recognise him as a tenant. Shortly after he entered notice was given by the lessor to the original lessees to quit, and that was met by a notice from the plaintiff that he also intended to quit. But it is quite plain upon this case that, though in point of fact the defendant knew that the plaintiff was occupying the farm, he did not know in what character he was there. The defendant knew nothing of the assignment, and he did nothing in any way to recognise the plaintiff as a tenant. This question now arises: the plaintiff claims, on the determination of the tenancy by the notice to quit from the defendant, to be entitled to the benefit of the covenant

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entered into by the defendant with Messrs. Elliott, to pay to them the valuations which were mentioned in the lease, and it is answered that he can have no such claim, because there is no privity of contract, no agreement between him and the defendant entitling him to that claim, and that the mere fact of his being the assignee of the tenancy from year to year does not enable him to set up any contract between him and the defendant under which he could claim these valuations. Now, what was assigned to the plaintiff was the whole of the interest of the original lessees in the tenancy from year to year, which might last from six to eighteen months, regard being had to the time at which notice to quit must be given. I cannot say that I have heard anything which satisfies me that, apart from the clause forbidding the original lessees to assign without licence, it would not be competent to a yearly tenant, holding upon the terms of an expired lease, to assign his interest with all its incidents under that lease in the tenancy; if he could not, it would lead to this inconvenience, that a person desirous of disposing of all his property for the benefit of his creditors, and having a substantial and valuable interest in the improved condition of a farm which he had occupied for a length of time, could not in any way make that interest available for the payment of his debts without the consent of his landlord. I do not see that the landlord could be injured if the law recognised a power in the tenant to assign such an incident as this, together with the right to possession. But knowing that my two learned Brothers are of a different opinion, and concurring with them in the result, I prefer to rest my judgment on another ground. It seems to me that, whatever interest the plaintiff had, he could have none but such as he derived from the original lessees, and their tenancy was a tenancy subject to this express condition, that they should not assign. The original lessees could not assign their lease so effectually, and so completely nullify the covenants it contained, as to deprive the landlord of his remedies upon them. But by the very terms of their lease they had no power to grant an interest to any one as against the landlord. It seems to me that, as they had not power to grant an interest to an assignee without the consent in writing of their landlord, their original tenancy continued until determined by the lessor, and he having

done nothing to recognise the new tenant, the plaintiff had no interest in the tenancy, and is not entitled to recover in this action.

LUSH, J. I concur that our judgment ought to be for the defendant, but I prefer to rest my judgment on the grounds expressed by my Brother Mellor. The facts of this case, which I need not recapitulate, forbid any inference that there was any new contract created between the plaintiff and the defendant. Therefore the plaintiff's claim must rest, if it has any foundation, upon a doctrine which, as far as I know, has been urged for the first time, namely, that the assignment of a parol tenancy passes to the assignee a right of action upon a special stipulation between the original landlord and the lessee, in the same manner as the assignment of a leasehold interest created by indenture passes a right of covenant. I am of opinion (and no vestige of an authority has been cited to the contrary) that the doctrine of conditions running with the land is confined to covenants annexed to the land by the indenture of demise, and there is no instance, so far as I know, in which a mere assignment of a parol tenancy has been held to pass to the assignees the right to enforce collateral stipulations. If there had been any facts in the case similar to those which existed in *Buckworth* v. *Simpson* (1), from which we could draw the inference that the landlord had consented to the substitution of the assignee in the place of the original tenants, that would have created a new contract between the plaintiff and the defendant, and then we could have drawn the inference that it would be on the same terms as that existing between the defendant and the original lessees. But those facts are altogether wanting, and the contention on behalf of the plaintiff, that a parol tenancy is to be put on the same footing as a tenancy created by indenture, cannot be supported, and our judgment must be for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Palmer, Palmer, & Bull.*

Attorneys for defendant: *Senior & Athee, for Blagden & Upton, Petworth.*

(1) 1 C. M. & R. 834.

END OF MICHAELMAS TERM.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXX VICTORIA.

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Jan. 16.

THE OVERSEERS OF EASTON, APPELLANTS; THE OVERSEERS OF ST. MARY, MARLBOROUGH, RESPONDENTS.

Poor—Removal—Irremoveability—Break of residence—Absence of wife with her husband on service as a soldier—9 & 10 Vict. c. 66, s. 1.

A husband and wife had resided for five years in a parish when he enlisted for a soldier, and they both followed the regiment abroad for several years till his death, when the widow returned immediately to the same parish; and after a month's residence became chargeable, when an order was obtained to remove her to her husband's parish of settlement:—

Held, that she had not become irremoveable; as the wife's absence with her husband while he is on service as a soldier is not excepted in the 9 & 10 Vict. c. 66, s. 1.

CASE stated under 12 & 13 Vict. c. 45, on an appeal against an order of justices for the borough of Marlborough, dated the 15th of November, 1865, adjudging the parish of Easton to be the place of the last legal settlement of Mary Chandler, widow, a pauper, and her three children, and ordering their removal from the parish of St. Mary, Marlborough, to the parish of Easton.

The pauper Mary Chandler is the widow of James Chandler, who, for the purposes of this case, is to be taken as having been

legally settled in the appellant parish. She was married to him on the 25th of December, 1850, having been previously living with her father in the respondent parish. After her marriage she and her husband continued to lodge with her father in the respondent parish without any interruption, and without receiving relief from any parish or otherwise, from December, 1850, down to October, 1856, and it is admitted that they had thereby acquired a status of irremoveability in the respondent parish.

In October, 1856, the husband enlisted as a soldier in her Majesty's service. He left the respondent parish in order to join his regiment, and after having been quartered with it at various stations in England, he ultimately proceeded with the regiment to Gibraltar, and there remained with it, and continued uninterruptedly in her Majesty's service up to the time of his death, which took place at Gibraltar, in September, 1865.

Shortly after he had left the respondent parish, Mary Chandler and their eldest child Agnes joined him at Woolwich, where he was serving with his regiment, and they with the two children subsequently born continued to live with him until his death at the various places to which the regiment was sent, none of which were within the Marlborough Union, to which the respondent parish belongs.

Immediately after his death, Mary Chandler returned with her three children from Gibraltar to the respondent parish, where her father was still living; and they have continued to reside there ever since.

After they had resided for a month in the respondent parish they became chargeable to it, whereupon the order of removal to the appellant parish was made, against which this appeal has been entered.

The Court had power to draw inferences of fact.

The question for the opinion of the Court was, whether the pauper and her three children were, or were not, removeable from the respondent to the appellant parish.

Lopes (*George* with him), for the respondents. The pauper was rightly removed. Her absence from the respondent parish does not come within the proviso of 9 & 10 Vict. c. 66, s. 1, and was there-

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fore a break in her own residence. No doubt, if the husband had returned direct from service as a soldier, he would have been irremoveable, and his wife too, as long as he lived, would have remained irremoveable: *Reg.* v. *Hartfield* (1); but he is dead, and his status of irremoveability does not survive to the wife: *Reg.* v. *Cudham.* (2)

H. T. Cole, Q.C. (*G. Howard* with him). The pauper was irremoveable. *Reg.* v. *Hartfield* (1) shews that absence on service as a soldier is to be excluded for all purposes, and as the residence as wife and widow may be joined—*Reg.* v. *Glossop* (3)—the widow became irremoveable by virtue of the coalition of her two residences. At all events, she is not removeable till a year after the husband's death under s. 2, for he must be taken to have intended to return: *Reg.* v. *East Stonehouse.* (4)

[LUSH, J. She was not residing in the parish at the time of his death.]

COCKBURN, C.J. The order was clearly right. It is to be regretted that the woman should be taken from the parish in which her connections are, but, unfortunately, a wife's absence with her husband on service is not included within the exception in the statute. The pauper, therefore, by reason of the break in her residence, had not become irremoveable.

BLACKBURN and LUSH, JJ., concurred.

Order affirmed.

Attorneys for appellants: *Lewis, Wood, & Street, for Dixon & Dixon, Pewsey.*

Attorneys for respondents: *Merriman & Pike, for E. B. Merriman, Marlborough.*

(1) 17 Q. B. 746; 21 L. J. (M.C.) 65.
(2) 1 E. & E. 409; 28 L. J. (M.C.) 105.
(3) 12 Q. B. 117; 17 L. J. (M.C.) 171.
(4) 4 E. & B. 901; 24 L. J. (M.C.) 121.

THE LIVERPOOL NEW CATTLE MARKET COMPANY, APPELLANTS; HODSON, RESPONDENT. 1867 *Jan.* 16.

Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 64—*Newly establishing the business of a Slaughterer of Cattle.*

By s. 64 of the Public Health Act, 1848, the business of a slaughterer of cattle, &c., or other noxious or offensive business, shall not be newly established in any building or place in any district, after the act has been applied to it, without the consent of the local board of health; and whosoever offends against this enactment shall be liable, for each offence, to a penalty of 50*l.*

A cattle market company, cattle having never been slaughtered in the market before, after the act had been applied to the district, erected a building, in which they allowed persons to slaughter cattle on the payment of 2*s.* a head, the company finding the tackle attached to the building, but the persons slaughtering bringing their own implements:—

Held, that the company were liable to the penalty.

CASE stated by justices under 20 & 21 Vict. c. 43.

The Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Local Government Act, 1858 (21 & 22 Vict. c. 98), were applied to the district of West Derby, in the county of Lancaster, in 1860. By 2 Wm. 4, c. viii., a company was constituted for establishing a cattle market in the parish of Walton-on-the-Hill.

The market is wholly situate within the limits of the district of the local board of health of West Derby. No part of the market or premises has ever been registered as a slaughter-house under s. 127 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), or under s. 61 of the Public Health Act, 1848. No part was ever used as a slaughter-house, nor were any animals ever slaughtered there, prior to the 5th of March, 1866. In or about November, 1865, the Cattle Market Company proceeded to erect and complete upon their premises a building suitable for the slaughtering of cattle. The slaughtering of cattle in the slaughter-house was commenced on the 5th of March, 1866, and cattle have been slaughtered from time to time in such slaughter-house up to the 4th of April, 1866. The course of business has been, that the company have permitted owners of cattle to slaughter them on the company's premises, such owners using the tackle in the building, and for each beast slaughtered the company charge and are paid 2*s.* The company do not slaughter the cattle by their own

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servants, but the men actually employed in the slaughtering are employed by the owners of the cattle, and such owners provide all tools and implements, except the tackle, &c., appurtenant to the building. The local board have given no consent to the slaughtering of cattle on the premises.

An information was laid on the 4th of April, 1866, by the respondent, as clerk of the local board, against the company, charging that they did, within six calendar months last past, to wit, on or about the 2nd of April instant, within the district of the said local board, newly establish in a certain building or place, to wit, &c., the business of slaughterers of cattle, after the Public Health Act, 1848, was applied to the district in which such building as aforesaid is situate, without the consent of the local board, contrary to the provisions of the said act.

Upon the hearing, the above statement of facts was admitted to be true; and thereupon the justices determined that the company had newly established the business of slaughterers of cattle, without the consent of the local board of health, contrary to s. 64 of the Public Health Act, 1848, and adjudged them for their offence to pay the penalty, 50*l*.

The question of law for the opinion of the Court was, whether the company did newly establish the business of slaughterers of cattle within the meaning of s. 64 of the Public Health Act, 1848.

Pope, for the respondent. The conviction was under s. 64 (1) of the Public Health Act, 1848 (11 & 12 Vict. c. 63). Section 61 of that act, as to registering slaughter-houses, and part of s. 62, as to making bye-laws for the inspection of them, are repealed by s. 48 of 21 & 22 Vict. c. 98, and by s. 4 the two acts are to be read as one; and ss. 125—127 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), contain enactments as to the licensing of slaughter-

(1) 11 & 12 Vict. c. 63, s. 64. "The business of a blood boiler, bone boiler, fellmonger, slaughterer of cattle, horses, or animals of any description, soap boiler, tallow melter, tripe boiler, or other noxious or offensive business, trade, or manufacture, shall not be newly established in any building or place, after this act is applied to the district in which such building or place is situate, without the consent of the local board of health, unless the general board shall otherwise direct; and whosoever offends against this enactment shall be liable for each offence to a penalty of 50*l*., and a further penalty of 40*s*. for each day during which the offence is continued."

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houses; but s. 64 of the 11 & 12 Vict. c. 63 still remains in force. There can be no doubt on simply reading the facts, that the appellants did establish the business of "slaughterers of cattle;" it is perfectly immaterial whether they slaughter the cattle themselves or allow other persons to do it; the latter course, indeed, establishes the business to a larger extent. No authority can be wanted, but the dictum of Lush, J., in *Reg.* v. *Heyworth* (1), shews that in such cases it is the occupier of the building, and not the person who merely temporarily uses it, that is liable.

Aspinall, Q.C. (*C. Russell* with him), for the appellants. The appellants did not establish the business of slaughterers of cattle within the meaning of s. 64. Possibly they would have come within s. 61 for "suffering to be used" an unregistered slaughter-house; but that section is repealed. The appellants were not slaughterers of cattle.

[COCKBURN, C.J. Who does establish the business, if the appellants do not?]

The butchers, or probably no one; but this is a very penal enactment, and there are others of a less severe character which would meet the justice of the case. *Reg.* v. *Heyworth* (1) is no authority on this point; and *Reg.* v. *Strugnell* (2), cited in it, is altogether on a different matter.

Pope was not heard in reply.

COCKBURN, C.J. I am of opinion that the conviction was perfectly right. The enactment is that the business of a slaughterer of cattle shall not be newly established, and whoever offends against the enactment is to be liable to penalties. If the offence had been made a misdemeanour, the appellants, as accessories to what

(1) 14 *Law Times* (N. S.), 600. Nothing was *decided* in that case. Justices, having convicted one of the journeymen butchers, employed as mentioned in the principal case, under 10 & 11 Vict. c. 34, s. 126, for having "used" an unlicensed slaughter-house, refused to state a case; and Lush, J. (June 12, 1866, in the Bail Court), made a rule absolute upon the justices to state a case, as the point was not frivolous, saying, "The licence in such cases is to the place, as was held in *Reg.* v. *Strugnell* (Law Rep. 1 Q. B. 93). Sections 125-127 shew the licence is to the place, and the penalty is imposed not on any person slaughtering but "using." The owner "uses" by letting others come and slaughter on his premises."

(2) Law Rep. 1 Q. B. 93.

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was done on their premises, would have been guilty of the misdemeanour. So are they offenders against the enactment. They are just as much concerned in the business of slaughtering cattle as the persons who actually slaughter them. They hold out to the butchers, "We will find the place if you will pay us for the use." It is impossible to say the appellants are not offenders against the enactment within the meaning of the section, and liable to the penalties imposed.

BLACKBURN, J. I am of the same opinion. Mr. Aspinall's argument went entirely on the words used being equivalent to saying, the business of a slaughterer of cattle shall not be carried on, and that a person, to be an offender, must carry it on so as to be a trader under the denomination of a cattle slaughterer within the bankruptcy acts. The meaning of the section is, the things mentioned shall not be done to such an extent as to be a business; and the killing of one or two cattle possibly would not establish the business of a slaughterer; but if it be done to the extent of creating a business, it is immaterial whether the business is carried on by the company through their own servants, or by suffering many independent persons each to kill his own beast on the company's premises provided for the very purpose.

LUSH, J. I am also of the same opinion. The appellants are the persons, and the only persons, who have caused the act to be done which the statute says shall not be done.

Judgment for the respondent.

Attorneys for appellants: *Chester & Urquhart.*
Attorneys for respondent: *Clark, Son, & Rawlings.*

LORD FITZHARDINGE *v.* PRITCHETT AND OTHERS. 1867

Poor-rate—"Saleable underwoods"—43 Eliz. c. 2, s. 1. *Jan.* 18.

The question whether woods are "saleable underwoods," and so rateable to the relief of the poor under 43 Eliz. c. 2, s. 1, depends on the mode and object of their cultivation; and if these be to produce a succession of profitable crops from the same stools and roots, the woods so treated are "saleable underwoods;" and it is immaterial at what intervals the successive crops are cut, and of what species of tree the woods consist.

REPLEVIN; to which the defendants avowed, generally, as the churchwardens and overseers of the parish of Wotton-under-Edge, for poor rates, under 43 Eliz. c. 2, s. 19.

The plaintiff took issue on the avowry, and pleaded that he was wrongfully rated as the occupier of saleable underwoods, and that the woods were not saleable underwoods or liable to be rated under the statute.

Issue joined.

At the trial before Keating, J., at the Gloucestershire spring assizes, 1865, a verdict was taken for the plaintiff, subject to the following case:—

1 and 2. The plaintiff is the owner and occupier of certain woods lying partly in the parish of Wotton-under-Edge, in the county of Gloucester, of which the defendants are overseers and churchwardens, and partly in the adjoining parish of North Nibley, in the same county.

3. The woods cover some hundreds of acres, about 172 acres being in Wotton.

4. The woods are composed almost entirely of beech, having a very little ash and hazel intermixed, and consist principally of stools, but have a large number of maiden trees in them.

5. A maiden tree is a tree springing from seed, and which has never been cut down. A stool is formed in the following way: A maiden tree is cut down near to the roots; a number of shoots spring out from the stump; these shoots, after a period, and in a manner hereinafter to be more specially mentioned, are cut off, and fresh shoots again spring out, and the process is continued as long as the vitality of the stool continues. By the continuation of this

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process the stool gradually increases in size, presenting, when cut, the appearance of the head of a pollard tree standing above the ground, and, in the case of the very ancient ones, the appearance of several such heads fixed to, and forming part of, a spreading mass of wood, partly above and partly below the ground, and supported from roots throughout.

6. The treatment of the woods is as follows: They are cut in patches of several acres in extent, in such manner that each patch is cut on an average once in thirty years. There is a cutting every year of some portion of these woods, but as these woods extend into the adjoining parish of North Nibley, such annual cutting is sometimes in North Nibley and sometimes in Wotton-under-Edge. In cutting, some of the maiden trees are cut down near the ground, some left standing, some of the stools are cleared entirely of all stems or shoots, and some have stems or shoots left on them called "leaders;" the object of the cutters being to have the uncut maiden trees and leaders scattered with tolerable regularity over the ground, and so as to favour their full growth. The maiden trees and leaders thus left are about ten years old, and vary from seven feet to twenty or twenty five feet high, the latter being in general the case. The number of leaders left on a stool varies; sometimes (as already stated) the stools are cleared, and these are not left, but generally one, two, or three leaders are left, in some few cases even six or seven.

7. During the period of thirty years which elapses before the next cutting, these uncut maiden trees and leaders do not increase so much in height as in bulk; and, inasmuch as the woods are on the hill, and the soil and situation at the bottom are more favourable to them than at the top, they increase more rapidly the lower they are on the slope. At the end of that period they are generally about twenty five to thirty feet high; even at the top of the woods some attain, and some nearly attain, what is called timber size in the timber trade, *i.e.* six inches quarter girth half way up, which roughly approximates to thirty two inches at the bottom; and the average girth is about twenty inches girth round the bottom, or not quite four inches quarter girth half way up; and at the bottom of the woods the growth is finer.

8. During the same period the stools also produce a large num-

ber of other fresh shoots, which, when the time for cutting comes round, are of various sizes, but not fit for the purpose of what is called "pit-wood" or coalpit-timber," which ought to be at least two and a half or three inches quarter girth.

9. When the woods are cut, as hereinbefore described, those stems which are large enough for pit-wood or coalpit-timber are trimmed of their branches, and their tops are cut off at the proper height, so as to form stems or trunks to be sold for use in the coal-mines; as much of these branches and tops, and as much of the inferior stems as are large enough, are cut into cord-wood, and the remainder of the material is sold as brush-wood or faggots. The object of this peculiar treatment in this kind of wood is to obtain pit-wood or coalpit-timber, and the obtaining of the cord-wood and faggots is subsidiary to, and only an inevitable and natural adjunct to this treatment.

10. The woods are bought standing from Lord Fitzhardinge at from 8*l.* to 10*l.* per acre. The pit-wood or coalpit-timber is cut for the buyer by the woodcutters by the ton, and then sold by him by the ton or foot, and the brush-wood and faggots are sold by him the said buyer by the acre.

11. It is admitted, and was so on the trial, that, by the custom of the county of Gloucester, beech is timber; but it is contended, on the part of the defendants, that shoots, sticks, stems, or germs growing from old stools, although of the growth aforesaid, and treated in the manner in which the produce of the stools in the woods in question has been treated, are not timber, and are liable to be rated to the poor as saleable underwoods.

12. In the county of Gloucester there are, first, woods consisting of large trees growing from their own roots, with underwood beneath them, in which the trees are cut down once for all, and are clearly timber trees. Beech woods of this description exist in the district round the woods which are now in question. Second, beechwoods such as those now in question, and treated as they are. Third, woods consisting of oak and ash, coppice or underwood, growing partly from stocks, partly as maiden trees. Some of these woods are cut at intervals of thirteen or fourteen years, and some at intervals of twenty one years, according to the nature of the soil and proportion of oak, which is of slower growth than the ash.

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The ash is cut clean to the ground, but there is left a stock of oak stems, called "stores," growing partly as maiden trees, partly from stools; and of these stores at the next cutting about three fourths are cut down, and about a fourth left, and called double stores, which are cut down at the next cutting. Such of the wood as is large enough is used for fencing and analogous purposes, but the main object is to obtain oak bark, which is most valuable when grown on young wood. When the coppice is purely oak, it is cut down clean at about twenty one years' growth. This third class of woods exists on the opposite or western side of the county. Fourth, woods consisting of hazel and ash underwood, in which the stems are completely cleared away every fourteen or fifteen years, are greatly inferior in size to those of the woods in question in the present case, are used for hoops and hurdles, and generally, though not universally, cut by the acre, but sometimes are cut by the ton. Woods of this description exist in the neighbourhood of the woods now in question.

13. The woodcutters of the district call these beech woods now in question timber, because they are not completely cleared, because they are grown for coalpit-timber, because they are cut by the ton (timber being generally cut by the ton, foot, or pole), because there is so great an interval between the cuttings, and because of the size which the stems obtain, as distinguished from woods of hazel and ash in the district, which they call underwood, and which are treated as hereinbefore mentioned.

14. With respect to timber merchants, surveyors, and land agents, some call the woods timber, because of their incomplete clearance, their fitness for coalpit-timber, their being cut by the ton, and not the acre, and because of the interval between the cuttings so far exceeding fourteen or fifteen years; whilst others call them underwood because they are treated with the object of, and so as to effect a long-continued series of, reproductions from stools, and because of the size of the stems being so generally under what is called timber size in the timber trade.

15. No succession duty has been paid on the woods in question, and they are subject to a tithe rentcharge, but no rates for the relief of the poor have ever been paid in respect thereof.

16. On the 21st of April, 1864, in a poor rate for the parish of

Wotton, the plaintiff was rated as occupier of the 172 acres of the woods mentioned in paragraph 3, by the description of "saleable underwoods," at 1*l.* 14*s.* 10*d.*

The case then set out a demand, summons, and issue of a warrant of distress.

The Court were to be at liberty to draw inferences of fact.

The question for the Court was, whether the said woods are "saleable underwoods" within the meaning of 43 Eliz. c. 2, so as to render the plaintiff liable to be rated to the relief of the poor in respect thereof.

Powell, Q.C. (*H. James* with him), for the plaintiff. These woods were not "saleable underwoods" within the meaning of 43 Eliz. c. 2, s. 1, which gives power to the churchwardens and overseers of every parish "to raise, weekly or otherwise, by taxation of every occupier of lands, houses, tithes, coal mines, or saleable underwoods," a competent sum towards the maintenance of the poor. Beech is timber according to the custom round Gloucestershire, and therefore cannot be saleable underwood. In *Rex* v. *Minchin Hampton* (1), the fact that beech trees were timber by the custom of the country in this very county of Gloucester, was held by Lord Mansfield and the rest of the Court conclusive against their rateability; and Lord Mansfield says, the justices "expressly state that beech is *timber* by the custom of that county. It is not the use it is put to that makes it either timber or not timber: its being timber or not being timber depends upon the custom of the country."

[LUSH, J. The statute says nothing about timber.]

In *Rex* v. *Mirfield* (2) it does not appear of what species the woods were, and the only point was, whether they were rateable on an average every year, or only in the year they were cut. But in *Aubrey* v. *Fisher* (3), on beech being shewn to be timber by the custom of the country, the Court held that a tree of twenty years' growth was timber, whatever its size, and could not be saleable underwood. So in *Rex* v. *Ferrybridge* (4), fir trees, though cut from time to time and sold, were held not to be underwood; and in *Reg.*

(1) 3 Burr. 1308, 1312.
(2) 10 East, 219.
(3) 10 East, 446.
(4) 1 B. & C. 375.

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v. *Narberth* (1) an oak wood, treated very much as the present, was held not rateable. Coke, 2nd Inst. 642, treating of the difference between gros bois and subbois, makes the same distinction; for he says: "This word grosse signifieth specially such wood as hath been, or is either by the common law or custom of the country, timber; for this act extends not to other woods that have not been or will not serve for timber, though they be of the greatness or bigness of timber . . . . Here it is to be demanded to what kind of wood grosse bois do extend, and the answer is, that oak, ash, and elm are included within these words; and so is beech, horse-beech, and hornbeam, because they serve for building or reparation of houses, cottages," &c.; and he cites the case of *Brook* v. *Rogers* (2), which shews that trees above twenty years' growth, which are timber, are not titheable, although the loppings are cut every ten or twelve years; and to the same effect is *Liford's Case.* (3)

[MELLOR, J. The judgment of Holroyd, J., in *Rex* v. *Ferrybridge* (4), points out clearly that the species of tree does not affect the question, but the object for which they are planted and the mode of management.]

Gray, Q.C. (*Macnamara* with him), for the defendants. As between tenant for life and reversioner seasonable wood is treated as fruit, just in the same way as loppings. It is an obvious fallacy put forward by the other side, to say that a timber tree cannot form saleable underwood. What was understood by underwood in the time of Elizabeth, is precisely pointed out by 35 Hen. 8, c. 17: "The bill for the preservation of woods," which was made perpetual by the 13 Eliz. c. 25, with some further enactments in s. 18. Now, in s. 1 of 35 Hen. 8, c. 17, it is enacted, "That in and upon all and singular several woods, commonly called coppice woods or underwoods, which from or after the feast of St. Michael the Archangel, which shall be in the year of our Lord God 1544, shall be felled at twenty four years growing or under, there shall be left standing and unfelled, for every acre of wood that shall be felled within the said coppice, twelve standils or storers of oak; and if there be not so many standils or storers of oak there, that then there shall be left so many of other kind, that is to say, of

(1) 9 Ad. & E. 815.
(2) Cro. Jac. 100.
(3) 11 Rep. at pp. 48, 49.
(4) 1 B. & C. at p. 386.

elm, ash, asp, or beech, as shall make up the same number of twelve standils or storers, likely to prove and to be timber trees; the same standils or storers to be of such standils or storers as have been left there standing at any the felling of the same coppice woods or underwoods, in times past;" and there are other enactments to a similar effect, which clearly shew that by underwood might be understood the shoots of oak or any other timber tree springing from stools. In *Rex* v. *Minchin Hampton* (1) there was no coppice or underwood, but simply timber trees; and Lord Mansfield does not say oak or beech cannot be underwood, but simply that, the sessions having found it was grown as timber, it must be so treated. In *Rex* v. *Mirfield* (2), Lord Ellenborough says that the woods were rateable every year if "intended and destined for sale," as these woods were. In *Rex* v. *Ferrybridge* (3) the trees were fir, which cannot produce a succession of crops; but the judgments of the Court make no distinction between timber and other trees. Lastly, *Reg.* v. *Narberth* (4) is no authority for the defendants; the woods there had been treated much as in the present case, though at longer intervals of cutting; and all the members of the Court, while holding themselves bound by the finding of the sessions, implied that they thought the finding erroneous.

[LUSH, J. The woods in *Reg.* v. *Narberth* (4) were oak; so that if the criterion started by the ~~defendants~~ plaintiff were the true one, there would have been a short answer to the defendants' case.]

Powell, Q.C., in reply.

MELLOR, J. I am of opinion that our judgment must be for the defendants. The question is, whether these woods were "saleable underwoods" within the meaning of the statute of Elizabeth. The woods, of which there are 172 acres in the parish of Wotton, consist almost entirely of beech, which, by the custom of Gloucestershire, is a timber tree. The mode and object of the cultivation of these woods is given in paragraphs 5 and 6 of the case. The treatment and object being to raise from time to time from the same stools, by cutting down the shoots, a succession of crops of

(1) 3 Burr. 1308.
(2) 10 East, at p. 224.
(3) 1 B. & C. 375.
(4) 9 Ad. & E. 815.

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fresh material, mainly for the purpose of pit-wood. Now, as I understood Mr. Powell's argument, he contends that the question whether they are "saleable underwoods" depends on whether or not the woods so treated and cut down consist of what are "timber trees," either by general or local custom. I do not agree to that proposition; the nature and quality of the wood, that is whether it is "timber" or not, is not the test; and the authorities shew this. Wherever the woods are treated, as in the present case, so as to raise successive crops from the same roots and stools, whether the crops ripen and are cut at an interval of ten, fifteen, or even thirty years, is immaterial; for the purpose of rating there is a succession of profitable crops, just as of any other crops, only the gathering is at longer intervals. The case of *Rex* v. *Mirfield* (1) shews that the interval makes no difference, and the woods are rateable at an annual profit distributed over the period between each cutting, in the present case over an average of thirty years. To hold otherwise, and say that the rateability depends on whether or not woods be of a species of tree which is timber, would be to make the construction of the statute depend on custom, whereas there is no distinction made in the statute, and all trees are to be rated if the woods consist of "saleable underwoods." It is true, there is a distinction between coal and other mines, but that is a distinction of general application, and arises from the fact that coal mines are the only mines mentioned; and whatever may be the ground for the distinction, it depends entirely on the words used in the statute; whereas the words now in question are general,—"saleable underwoods." Whether, therefore, the woods consist of oak, ash, or elm, which are universally timber trees, or of beech, which may be timber by custom, or willow, the stools of which can be and are so treated as to produce a succession of saleable crops, in such cases the woods are saleable underwoods. If any doubt exist on this point, a reference to the authorities shews that this is the general understanding. Thus, Nolan, in his treatise on the Poor Laws, vol. ii. p. 156, 4th ed., after citing Holroyd, J.'s, judgment in *Rex* v. *Ferrybridge* (2), and the other cases then decided, says: "From these cases it seems decided that whether the species planted comes within the descrip-

(1) 10 East, 219. (2) 1 B. & C. at p. 386.

tion of timber in the intendment of the common law, or the operation of local custom; or whether, like *hazel*, it is only valuable as underwood, is immaterial to the question of rateability, for that depends, not upon the nature and quality of the wood, but upon its cultivation and management as underwood, for the purpose of yielding renewable profits." So Littledale, J., in *Reg.* v. *Narberth* (1), says: "Small wood, never likely to be used for timber, may be called underwood; so may plantations of timber trees, not intended for permanent growth, but to be cut at stated intervals for use as hop poles, or for other similar purposes. Here the poles were never meant for growth as timber, and may therefore be properly called underwood. Then are they *saleable* underwoods? A capacity of being sold for profit belongs to all wood; the statute must, therefore, be taken to mean underwoods cut down for sale at regular and calculable periods." I cannot, therefore, see any ground for the distinction set up on behalf of the plaintiff, that beech is a timber tree in Gloucestershire. No doubt a wood may be such, as hazel, as to be incapable of being anything but underwood; but the mode and object of the cultivation is the true criterion. Thus, in *Rex* v. *Ferrybridge* (2), firs and larches were held not saleable underwoods, for though not timber and cut down from time to time and sold, they were not cut down as a succession of crops, but to give room to the oaks, to shelter which they had been originally planted; and, moreover, a fir tree when once cut down, does not spring up again, or throw up fresh shoots from the root. Not only, however, is beech capable of such renewal, but these woods are treated for the very purpose of successive crops; and, as I have already said, the interval between each crop, whether twenty, five and twenty, or thirty years, is immaterial. Mr. Gray also cited a statute of 35 Hen. 8, c. 17, made perpetual by statute of 13 Eliz., for the preservation of woods, which applies the term coppice or underwoods to oak and other timber trees, in a way that shews, that, about the very time of the statute now in question, underwood was taken as the growth arising from the stools of timber trees. On these grounds, I am clearly of opinion that these woods were saleable underwoods and rateable; and therefore there must be judgment for the defendants.

(1) 9 Ad. & E. at p. 818. (2) 1 B. & C. 375.

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LUSH, J. It seems to me that we are doing no violence to any of the cases that have been decided on the subject, in holding that these woods are saleable underwoods, and therefore the subject of rating. It is said, on behalf of the plaintiff, that if the wood be formed of a species of tree that is capable of ripening into timber, it cannot be saleable underwood. That cannot be the test; the statute says nothing about the species or quality of the wood, it simply says, amongst other things, "saleable underwoods" shall be rateable. No doubt some species of tree, such as hazel, are only valuable as underwood; but there are others, as oak, which are timber, and so may be parcel of the inheritance, but yet may be so treated, as, instead of making timber, to supply a succession of renewable crops; and, it appears to me, that all woods that are so treated as to produce periodical profits from the same stools and roots, are "saleable underwoods" within the statute.

Judgment for the defendants.

Attorneys for plaintiff: *Hayes, Twisden, Parker, & Co.*

Attorneys for defendants: *Wright & Venn, for Adey, Wotton-under-Edge.*

Jan. 14.

REIN *v.* LANE AND OTHERS.

Stamp—"Charterparty," &c.—Guarantee for the performance by the Charterer of a Charterparty—5 & 6 Vict. c. 79, s. 2, & sch.

5 C.P.L. 3-5

A guarantee for the due performance of a charterparty does not require to be stamped, as "charterparty or agreement for the charter of any ship, or any memorandum, letter, or other writing between the captain or owner of any ship and any other person, for or relating to the freight or conveyance of goods, &c. on board such ship, &c.," within 5 & 6 Vict. c. 79, s. 2, and sch.

DECLARATION, that, in consideration that the plaintiff, at the request of the defendants, would enter into a charterparty for the charter of his ship *Ilion* with Messrs. J. Pierre Langlois & Co., to be signed by the defendants as the agents of the said charterers, the defendants guaranteed the performance of the charterparty by the charterers; that the charterparty was accordingly entered into, and the charterers committed a breach in not loading a cargo according to the stipulations therein.

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Plea, inter alia, that the defendants did not promise or guarantee as alleged.

At the trial before Cockburn, C.J., at the sittings in London, after Hilary Term, 1866, it appeared that the defendants, acting in London as brokers for Messrs. P. Langlois & Co., of Akyab, in 1864 entered into a negotiation with Clarkson & Co., as agents for the plaintiff, to charter his ship *Ilion*. A charter, dated 13th of July, 1864, was accordingly drawn up, expressed to be between Blumberg, captain of the *Ilion*, and Messrs. J. Pierre Langlois & Co., of Akyab, for a voyage from Akyab, &c., to the United Kingdom, or continent, to load a full cargo of rice, paying freight at 85*s.* per ton. The charter was signed by the defendants, "as agents to Messrs. J. P. Langlois & Co.," and the plaintiff's agents objected to act on it, as they were ignorant of the charterers, upon which the defendants, the next day, gave them the following letter:

"14th July, 1864.

Dear Sirs,—In consideration of our having signed the charter of the *Ilion*, dated 13th July, 1864, from Rice Ports (Akyab, &c.), to U. K., or continent, as agents to Messrs. J. P. Langlois & Co. of Akyab, we hereby guarantee the due fulfilment of same.

Yours truly,

Lane, Hankey, & Co."

The charterparty was duly stamped with a 5*s.* stamp; and the guarantee, stamped with a 6*d.* agreement stamp, was admitted, after objection; and the charterers' default having been admitted, the plaintiff had a verdict, leave being reserved to the defendants to move to enter a nonsuit, if the Court should think the guarantee was insufficiently stamped.

A rule having been obtained accordingly,

Brett, Q.C., and *Hannen*, shewed cause. The guarantee was properly stamped. The defendants contend that it comes within the description of document given in 5 & 6 Vict. c. 79, sch. In order to ascertain the meaning of the form of words used in the schedule, it will be as well shortly to review the course of legislation as to the stamps on charterparties. The first statute imposing a stamp on charterparties is the 5 Wm. & M. c. 21, s. 3, which im-

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poses a 6*d.* stamp on every "charterparty" simply; the 9 & 10 Wm. 3, c. 25, s. 37, is precisely the same. The 5 Geo. 3, c. 35, s. 10, after reciting certain doubts as to whether the duties of 6*d.* and 1*s.* imposed by former statutes on deeds extended to charterparties, enacts that they shall; and s. 11 gives the following definition: "Every deed, instrument, note, memorandum, letter, or other minument [*sic*] or writing between the captain or master, or owner, of any ship or vessel, and any merchant, trader, or other person, in respect to the freight or conveyance of any money, goods, wares, merchandize, or effects laden or to be laden on board of any such ship or vessel, shall be deemed and adjudged to be a charterparty." The 44 Geo. 3, c. 98, s. 2, and sch. A, increased the duty to 1*l.* 10*s.*, but uses very nearly the same words of description. The 48 Geo. 3, c. 149, after reciting that it is expedient to alter and amend the description of divers instruments, &c., in respect whereof stamp duties had been granted by former statutes, inter alia, 44 Geo. 3, c. 98, by s. 2 and sch., imposes a stamp of 1*l.* 10*s.* on "charterparty, or any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing, between the captain, master, or owner, of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board such ship or vessel." The 55 Geo. 3, c. 184, which is, in effect, a consolidating statute, by s. 2 and sch. imposes a stamp of 1*l.* 15*s.* on any charterparty, &c., using precisely the same words as in the previous statute. And this precise form of words is used in the schedule to the 5 & 6 Vict. c. 79, which, after (by s. 1) repealing the former duties, by s. 2 and sch. imposes a duty of 5*s.* on charterparties, &c. Now, it is absurd to suppose that the legislature could have intended, when the duty was 30*s.* or 35*s.*, to impose it on every writing passing between the parties as to freight, &c., which the words, taken literally, might mean. The addition of words of description to the simple use of the term charterparty was not with the object of extending the stamp to collateral agreements, but in order to include, not only a charterparty properly so called, but a document of a less formal nature, used in substitution for a charterparty. The language of s. 21 shews this, which forbids any officer of stamps to stamp, after execution, except within certain

limits, "any vellum, parchment, or paper, upon which shall be written any bill of lading, or any charterparty, or any agreement, contract, memorandum, letter, or other writing by this act chargeable with any duty *as a charterparty*." The other side may possibly rely on the cases which have decided that a guarantee by a third person on the sale of goods is "a contract relating to the sale of goods," within the exemption in the stamp acts as to agreements. But there is an obvious distinction: one is an exemption from stamp duty in favour of commerce, and is therefore to receive a wide construction; the present is an enactment imposing a duty on instruments of a particular nature, and ought not to be extended beyond the particular object.

E. James, Q.C., and *Watkin Williams*, in support of the rule. The words of the schedule are amply sufficient to include a guarantee for the due performance of a charterparty. It was really, in the present case, the instrument on which this ship undertook her voyage: she would never have sailed had not the defendants signed the document. A charterparty may be by parol; and if a guarantee for its due performance need not be stamped, there is an easy way of evading the stamp acts.

[BLACKBURN, J. Here, there is a charterparty duly stamped, and there is no attempt at evasion, which very possibly might not succeed.

LUSH, J. If such a document as this must be stamped, why should not a guarantee that a bill of exchange given for freight shall be paid also require a stamp?]

That would be relating to the payment, not relating to freight. The cases as to guarantees on the sale of goods are precisely in point; the language of the exemption is the same (1); and the difference of the mode of construction to be applied to a statute imposing a duty, and one exempting from a duty, is not tenable.

[BLACKBURN, J. The principle is adopted by Lord Ellenborough after Lord Kenyon and Buller, J. (2)]

The doctrine, no doubt, is adhered to down to *Sadler* v. *John-*

(1) The exemption in 55 Geo. 3, c. 184, sch., is, "Memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandizes."

(2) See *Curry* v. *Edensor*, 3 T. R. at pp. 527, 528; *Warrington* v. *Furbor*, 8 East, at p. 245.

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son (1); but in *Smith* v. *Cator* (2) Abbott, C.J., puts the test, that the "description is confined to instruments whereof the sale of goods is the *primary* object," which test directly applies to the present case. Here the primary object was the chartering of the ship.

COCKBURN, C.J. I am of opinion that this rule must be discharged. I agree that the language of the schedule to 5 & 6 Vict. c. 79, upon which this question arises, is ambiguous, and it might be considered to apply to such an agreement as the present, which was, however, not a charterparty, but simply an agreement subsidiary to the charterparty, being nothing more or less than a guarantee that the terms of the charterparty should be fulfilled by the charterers of the plaintiff's vessel. Now, it is true that in one sense this document, though a guarantee, would come within the terms "memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects, on board of such ship or vessel." But although the language of the statute is capable of such a construction, yet I should hesitate very much before I came to the conclusion that the legislature ever intended that in such a case as the present a double stamp should be paid. I cannot help thinking that the intention in adding these words, which form the latter part of the clause, was to prevent the possibility of any attempt being made to evade the payment of the stamp, by substituting for the instrument technically known under the term "charterparty" something which would not come within the technical meaning of that term. A charter is a well known mercantile instrument of a particular form, and if these statutes had simply said that charterparties should be subject to a stamp, no doubt attempts would have been made to evade the statutes by substituting things which, although charterparties in effect, might not be considered charterparties in form. Whether such attempts would have been effectual or not, it was a very wise policy in those who framed the stamp acts to put into the clause relating to charterparties such terms as would render any attempt of that kind abortive. But I cannot

(1) 16 M. & W. 775. (2) 2 B. & A. at p. 781.

suppose that, because in the present case there might, after the charterparty had been made, and a proper stamp appended, have been a subordinate agreement made between the owner of the vessel and a third party, or between the charterer and a third party, as the case might be, guaranteeing the fulfilment by the other party of the charterparty in its terms, the legislature intended to make such a subordinate instrument as that the subject of a second stamp. I think this construction is abundantly confirmed by s. 21, to which Mr. Brett has drawn our attention. It says that it shall not be lawful for the commissioners of stamps, or any of their officers, "to stamp any vellum, parchment, or paper, on which any bill of lading or any charterparty, or any agreement, contract, memorandum, letter, or other writing, by this act chargeable with any duty as a charterparty, is written," except on certain conditions. It shews, therefore, that when the legislature used the term "memorandum, letter, or other writing, relating," &c., they meant an instrument or document, used or intended to be used, in substitution of a charterparty. That being so, I think that we have not only reason and common sense to guide us in the construction, but we have the legislature's own interpretation of what is the meaning of the language they used.

BLACKBURN, J. I am of the same opinion. The question turns on what is the proper construction of a statute which imposes a duty upon charterparties; and we find that there have been earlier duties imposed upon charterparties by different statutes from time to time; but at last there comes in one of them a definition of what it was upon which the duty was imposed. And the words adopted for that purpose in the 48 Geo. 3, c. 149, have been carried down to the present time, and they are these: "A charterparty, or any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects, on board of such ship or vessel." Now, what do those words mean, used in such an instrument as an act of parliament imposing a duty upon charterparties? No doubt, if the words are taken in the most literal and extended, if not strained,

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ense that can be put upon them, they may be carried to this extent, that every letter from a captain in which he mentions anything about the freight would require a stamp, because it would be a letter relating in one sense to the freight of the goods on board. But that is not what is meant. We must construe the words of the statute imposing the duty according to the intention which those words express when used in such a statute for such a purpose; and taking that to be the construction, I cannot doubt that what my Lord says is the proper view that should be taken of it, that the stamp should only apply to a charterparty, or letters or agreement from the captain or owner which are in the nature of a charterparty, or that are relating to contracts for carriage, or relating to the carriage of goods in that sense, that they are so used as to be equivalent to and for the purpose of producing the same effect as a charterparty, and thereby evading the stamp. The legislature meant to stamp such documents as those, and did not intend to do more, and we ought not to carry the enactment further. That would not include the present case, which is a collateral agreement, guaranteeing on the part of the defendants that the charterers shall fulfil that which they have undertaken to perform. But then it is argued that, in the stamp acts where there is a duty imposed upon agreements, there is an exemption from the stamp duties, and among others "any memorandum, letter, or agreement, relating to the sale of any goods, wares, or merchandize;" and there are several cases in which it has been held that a guarantee as to the price that will be paid for goods which are to be sold, is an agreement relating to the sale of the goods, and consequently within the exemption. No doubt at first sight the two cases look very much the same. The words are much the same, and there is a similarity between a guarantee relating to goods and a guarantee relating to a charterparty. No doubt the cases, in one sense, are similar; and if the words were applicable to the same subject, they ought to have the same construction. But then, in the one case, the words are used in a statute imposing a duty for the purpose of raising a revenue, and the object in imposing that duty was to catch all things that were really in substance charterparties. In the other case the words are used for exempting and saving

from duty all agreements that were made for the purpose of effecting sales. The object of the one statute was to promote commerce, and it said, therefore, that agreements for the sale of goods should not be fettered or hampered by the imposition of any duty of this kind. Consequently the construction put upon it from the very earliest cases was, that wherever an agreement has for its primary object to produce or cause sales—I think the words are used in one of the earlier cases upon the subject (1)—where, but for the agreement or guarantee, the contract of sale would not be entered into, it should not require to be stamped; because the effect of that would be to check commerce and prevent the sale. In the one case, therefore, the exemption should be liberally construed, and being liberally construed the guarantee was brought within the meaning of the exemption. The legislature meant to free from stamp such documents as tended to produce contracts of sale which were considered meritorious, and good, and advantageous. If their object had been to impose clogs and burdens upon everything that would tend to produce a charterparty, on the ground that they were tainted with a nuisance, the same extended construction might be put upon the words. But the object of the legislature was quite the reverse. It is, I apprehend, in accordance with the general rule of construction in every case, that you are not only to look at the words, but you are to look at the context, the collocation, and the object of such words relating to such a matter, and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under such circumstances. The same words might mean a very different thing, when put in to impose a tax, from what they would mean when exempting from a tax.

LUSH, J. I am of the same opinion. I think that the words in question, upon which so much discussion has been had, are merely words of definition. A charterparty being in substance a contract for the conveyance of goods on board ship for freight, though by usage it has acquired a certain technical form, the statute means to impose a duty upon every document that so passes between the parties as to have the effect of a charterparty, no matter whether

(1) See *Smith* v. *Cator*, 2 B. & A. at p. 781.

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it be done in the form or shape of a charterparty, or whether it be done by a memorandum, or letter, or other document. But it was never intended, where there is a charterparty properly executed between the parties, which is a binding instrument, and properly stamped, to impose a stamp upon any other document because it happens to relate to that charterparty. If this instrument were liable to a stamp, I cannot at present see why the illustration that occurred to me in the course of the argument should not hold. If the freighter or charterer had given a bill of exchange in payment of the freight, and some one else had guaranteed the payment of that bill, I cannot see why that should not be equally liable to the stamp. I do not feel any difficulty, therefore, although the same words are found in this section as are found in the exemption clause as to agreements, in construing them differently. The act imposing the stamp duty on an agreement, by the enactment imposed it on every agreement where the amount was 20*l*. The exemption is equally general. Every agreement made for the sale of goods, it says, shall be exempted, and every memorandum, every letter, and every agreement made relating to that sale shall be also exempt. There can be no limit put upon the words "relating to," that would embrace everything, although the word "every" is not there. By necessary implication it is implied, and I feel no difficulty in putting the construction which has been put upon those words, as extending to every case where the object of the contract is one relating to that which is exempted in terms, viz. a contract for sale.

Rule discharged. (1)

Attorneys for plaintiff: *Plews & Irvine.*
Attorneys for defendants: *Cotterill & Sons.*

(1) By 28 & 29 Vict. c. 96, s. 7, "In lieu of the stamp duty of 5*s.* now chargeable by law on any charterparty, or any document chargeable with stamp duty as a charterparty, there shall be charged and paid thereon the stamp duty of sixpence." But by the same section "a charterparty or other such document as aforesaid" cannot be stamped after a calendar month from the date and first signing; so that the distinction between charterparties and agreements not chargeable with duty as charterparties is still material.

HORNBY, APPELLANT; CLOSE, RESPONDENT.

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Jan. 16.

Friendly Society—Enforcing Rules—Settlement of Disputes—Trades' Union, illegality of—18 & 19 *Vict. c.* 63, *ss.* 9, 24, 44.

By section 44 of 18 & 19 Vict. c. 63, the sections of the act as to settling disputes between members and the punishment of defaulting officers are to apply, "in the case of any friendly society established for any of the purposes mentioned in sect. 9, or for any purpose which is not illegal," though the rules have not been certified, provided a copy has been deposited with the registrar:—

Held, that a society, of which one of the objects was the relief of sick, disabled, and aged members, and the burial of dead members, but of which one of the main objects was that of a trades' union, and the support of members when on strike, was not within the section; as this purpose was not analogous to those in sect. 9, and moreover was an illegal purpose, in the sense of not being enforceable at law, as being in restraint of trade.

CASE stated by justices of the west riding of Yorkshire under 20 & 21 Vict. c. 43.

An information was laid on the 12th of January, 1866, at Bradford, in the said riding, by John Hornby (the appellant), boilermaker, the president of the Bradford Branch Society of the United Order of Boilermakers and Iron Shipbuilders, on behalf of the said society, a copy of the rules of which society have been duly deposited with the registrar of friendly societies in England, pursuant to the statute, charging that Charles Close (the respondent), boilermaker, on the 16th of December, 1865, at Bradford aforesaid, being then and there a member of the said society, and having in his possession certain moneys of the said society, amounting to 24*l.* 18*s.* 5½*d.*, did then and there unlawfully withhold the same from the said society, contrary to the form of the statute (18 & 19 Vict. c. 63, s. 24).

A summons upon the above information was issued, and on the hearing the charge against the respondent, as laid in the information, was fully proved.

A copy of the "Rules and Regulations of the United Society of Boilermakers and Iron Shipbuilders of Great Britain and Ireland" was put in, and admitted to be correct. A copy of such rules was transmitted with the case.

The following was the title-page of the rules: "Rules and

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regulations to be observed and strictly enforced by the United Society of Boilermakers and Iron Shipbuilders of Great Britain and Ireland. Instituted for the purpose of mutual relief of its members when out of employment, the relief of their sick, and burial of their dead, and other benevolent purposes, as inserted in their rules."

Rule 1, after repeating the purpose of the society as set out in the title-page, by s. 3, "It shall consist of an unlimited number of members, being persons legally working at the trade of boilermaking and iron shipbuilding, and residing in any part of Great Britain or Ireland."

Rules 2—9 related to the officers, their duties and salaries, consisting of president, stewards (each of whom, by rule 3, s. 2, is to visit the sick members twice in each week, on separate days), guardians and marshal, secretary, treasurer, trustees, auditors, and committee.

By rule 11, s. 1, no person shall be admitted a member, who is not a legal boilermaker or iron shipbuilder, or under twenty years of age; but every competent person applying shall be admitted, on payment of an entrance fee of 7*s.* 6*d.* to 1*l.*, according to age, and a subscription of 3*s.* 6*d.* every four weeks; s. 2, the person proposed must have worked not less than five years at the trade.

Rule 15. Relief to be given to sick members, for first twenty six weeks, 10*s.* per week; second twenty six weeks, 5*s.*; and after this, 4*s.* per week.

Rule 20, s. 1. Any free and full member thrown out of employment through depression in trade, or circumstances satisfactory to the members of his branch, shall receive a travelling card or certificate, &c. s. 2. The travelling relief to be 1*s.* 8*d.* for each of the six working days.

Rule 22, s. 1. Any member, disabled by loss of sight or limb, to receive a bonus, if he has paid for twelve months, 10*l.*; for two years, 20*l.*; for three years, 30*l.*; for four years, 40*l.*; for five years, 50*l.*; for six years, 60*l.*

Rule 23. A superannuated member who shall have subscribed for 18 years and be aged fifty, to receive 5*s.* per week for life.

Rule 25, s. 1, makes provision as to the funeral of members and their wives, viz. 12*l.* on the death of a member, and 6*l.* on the death of his wife.

It was contended for the respondent, that the society was not a society within s. 44 of the 18 & 19 Vict. c. 63; and further, that it was a society established for purposes which are illegal, being against public policy, in restraint of trade, and depriving the workman of the free exercise of his own will in the employment of his labour, and also in restraining him from getting employment or continuing in employment, or obtaining employment for a non-member of the society; and lastly, that the society was an organization for, or tending to, the encouraging and maintaining of strikes.

In support of these objections, the following passages in the rules and regulations of the society were relied on:

Rule 28. Piece-work.—Piece-work disputes and benefits from contingent fund. s. 1. That in districts where members are *compelled to work piece-work*, and it be proved to the satisfaction of the executive council that the firm is reducing the prices below the usual and reasonable prices, they shall allow the men resisting the reduction 7*s.* per week for two weeks, after being out six days; after which they shall receive their travelling cards, according to rule 20.

s. 2. That any member or members in a shop, either on piece-work or day-work, where a dispute arises connected with our trade or society, no member or members shall be allowed to call at such shop or shops after being made acquainted with such dispute, or for doing so to be fined the sum of 10*s.* And that any member of this society, either angle-iron smith, plater, rivetter, or holder-up, encouraging any holder-up or labourer to violate this rule, by allowing him to practise with his tools, or otherwise instructing him in other branches of the trade, contrary to these rules, shall, on proof thereof, be fined for the first offence 5*s.*, for the second 10*s.*, and for the third to be expelled the society.

Rule 29. Disputes on day-work and benefits. s. 1. Should a dispute arise in any shop, the members of that shop shall make it known to their branch, which, if it only affects the interest of two or three members, such branch to have power to settle it, and grant to members wishing to travel 12*s.* cards, or 12*s.* per week donation. But should a general dispute arise in any shop, which cannot be amicably settled by the branch, it shall be referred to the executive

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council, who shall give them instructions on the subject. All members losing their employment through such disputes, after being sanctioned by the executive, shall receive the sum of 12*s.* per week, so long as they remain out of employment. This rule to be applied to all disputes excepting the settlement of piece-work prices.

Rule 42, s. 1 (part of). Any member using his influence to obtain employment for a non-member, shall be fined for such offence 10*s.*

Rule 20, s. 4. Any member leaving his employment on his own responsibility, to seek for other employment, shall not be entitled to travelling relief until he has again been in employment one month.

The justices were of opinion that the objections urged on behalf of the respondent were valid; that the society in question was not within the 44th section of the 18 & 19 Vict. c. 63; and that the rules of the society in question shewed or set forth an illegal purpose; and consequently they dismissed the complaint.

The question was, whether the determination upon the facts and grounds previously stated is or is not erroneous in point of law.

Mellish, Q.C. (*Macnamara* with him), for the appellant. The society is not certified, nor could it have been certified, as a friendly society, under 18 & 19 Vict. c. 63, but its rules have been deposited with the registrar; and the question is, whether it is a society within s. 44, so as to be able to avail itself of s. 24. (1) Section 9

(1) 18 & 19 Vict. c. 63, s. 9. "It shall be lawful for any number of persons to form and establish a friendly society, under the provisions of this act, for the purpose of raising by voluntary subscriptions of the members thereof, with or without the aid of donations, a fund for any of the following objects: 1. For insuring a sum of money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the wife or child of a member. 2. For the relief or maintenance of the members, their husbands, wives, children, brothers or sisters, nephews or nieces, in old age, sickness, or widowhood, or the endowment of members or nominees of members at any age. 3. For any purpose which shall be authorized by a Secretary of State, or in Scotland by the Lord Advocate, as a purpose to which the powers and facilities of this act ought to be extended. . . . . And if such persons so intending to form and establish such society shall transmit rules for the government, guidance, and regulation of the same to the registrar, and shall obtain his certificate that the same are in conformity with law as hereinafter mentioned, then

defines the object of friendly societies; and no doubt when s. 44 speaks of a society "for any purpose," it must be intended any analogous purpose. Now it cannot be disputed that very many of these rules are strictly for benevolent objects within the act. Thus, rule 3, s. 2, as to visiting the sick; rule 15, as to relief; rule 20, ss. 1 and 2, as to travelling relief to members when seeking work during depression in trade; rule 22, as to bonus to disabled members, and rule 23, superannuation allowance to aged members, are surely all purposes within the act. And the rules relied upon by the respondent are not sufficient to take the society out of the scope or benefit of the act. The objects of those rules are not illegal; they are not illegal at common law, nor made so by the act; and even

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the society shall be deemed to be fully formed and established from the date of the certificate."

By s. 24: "If any officer, member, or other person, being or representing himself to be a member of such society, or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition, shall obtain possession of any moneys, securities, books, papers, or other effects of such society, or having the same in his possession shall withhold or misapply the same, or shall wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such society," jurisdiction is given to justices on complaint on behalf of the society to proceed against the officer charged in manner directed by 11 & 12 Vict. c. 43, and to order him to deliver up the effects of the society, or to repay the money applied improperly, together with a penalty not exceeding 20*l.*, and in default to imprison him with or without hard labour for a term not exceeding three months; with a proviso that the society may, nevertheless, proceed by indictment; but not if a conviction has been obtained.

By s. 40, disputes between members and the officers of the society are to be decided in the manner provided by the rules, which decision shall be conclusive without appeal. By s. 41, where the rules do not provide a mode of settlement, such disputes are to be decided by the county court.

s. 44: "In the case of any friendly society established for any of the purposes mentioned in s. 9, or for any purpose which is not illegal, having written or printed rules, whose rules have not been certified by the registrar, provided a copy of such rules shall have been deposited with the registrar, every dispute between any members of such society and the trustees, treasurer, or other officer, or the committee of such society, shall be decided in manner hereinbefore provided with respect to disputes, and the decision thereof, in the case of societies to be established under this act, and the sections (40, 41) in this act provided for such decision, and also the section (24) in this act which enacts a punishment in case of fraud or imposition by an officer, member, or person, shall be applicable to such uncertified societies," with a proviso that an uncertified society shall have no other of the advantages conferred by the act.

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if they are void as in restraint of trade, on the principle of *Hilton* v. *Erkersley* (1), that would not render the purpose of the society itself illegal; and the Court of Queen's Bench and Exchequer Chamber expressly refrained from saying that these combinations had anything criminal in them.

The respondent did not appear.

COCKBURN, C.J. We ought not to hesitate a moment in saying that we think the magistrates were perfectly right in holding that this society did not come within the operation of the Friendly Societies Act, so as to give the magistrates jurisdiction. I quite agree with Mr. Mellish that, supposing the main purpose of the society were within the 9th section, as being benevolent, it would not, by reason of one or two of the rules being beyond that purpose, cease to be a society within the act. It is therefore, in each case, material to inquire what the purposes of the society were. Here we find the very purposes of the existence of the society not merely those of a friendly society, but to carry out the objects of a trades' union. Under that term may be included every combination by which men bind themselves not to work except under certain conditions, and to support one another, in the event of being thrown out of employment, in carrying out the views of the majority. I am very far from saying that the members of a trades' union constituted for such purposes would bring themselves within the criminal law; but the rules of such a society would certainly operate in restraint of trade, and would therefore, in that sense, be unlawful; and on the principle on which the Court of Error, in *Hilton* v. *Eckersley* (2), affirming the decision of this Court, held that a bond, given by masters to observe rules in their business which were in restraint of trade, was so far illegal that it could not be enforced in a court of law, we hold that these rules of a society of workmen being in restraint of trade are also so far illegal; that is to say, when we find one of the main objects of a society is that of a trades' union, many of its rules being in restraint of trade, so that if an action were brought to enforce a civil right in respect of any of them they would be held not enforceable at law, in the same sense we

(1) 6 E. & B. 47, 66; 24 L. J. (Q.B.) 353; 25 L. J. (Q.B.) 199. 1 Jur. N.S. 874

(2) 6 E. & B. 66; 25 L. J. (Q.B.) 199. 2 Jur. N.S. 587

hold the society is not "for a purpose which is not illegal," and so not within the act. Therefore, for these two reasons we hold the present society not within s. 44; first, because it is for a purpose not analogous to that of a benevolent or friendly society such as is mentioned in s. 9; and secondly, because those rules, although they may not be illegal in the sense of bringing the parties to them within the criminal law, are in restraint of trade, and so far illegal.

BLACKBURN, J. I am of the same opinion. The magistrates had no jurisdiction, unless the society was within s. 44, which extends certain of the clauses of the act to a friendly society whose rules have been deposited but not certified, being "a friendly society established for any of the purposes mentioned in s. 9, or for any purpose which is not illegal." Mr. Mellish very properly admitted that "any purpose" must be confined to any purpose analogous to those mentioned in s. 9; for a literal construction of any purpose whatever would be contrary to all rules of interpretation. And the first question is, is this society for any analogous purpose? Now, as the Lord Chief Justice has said, the purposes of a trades' union are clearly not analogous to those of a friendly society. A little deviation from the strict purpose of a friendly society might not take the society out of the scope of the act; but here a main object certainly—if not the main object, I think the main object—was that of a trades' union, and therefore the magistrates were fully justified in declining to act. Secondly, I go further, and think the rules illegal in the sense of void, according to the principle of *Hilton* v. *Eckersley* (1),—a case of combination by masters, but the same principle must apply to combinations of men,—that they are not enforceable at law. The Court of Exchequer Chamber in that case carefully avoid going further, and saying whether or not the objects of the masters were illegal in the sense of being criminal; and, acting on the authority of that case in the Exchequer Chamber, and adopting the view of Crompton, J., in the court below, I wish to guard myself from being supposed to express any opinion on the present case. I do not say the objects of this society are criminal. I do not say they are not. But I am clearly of opinion

(1) 6 E. & B. 47, 66; 24 L. J. (Q.B.) 353; 25 L. J. (Q.B.) 199.

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that the rules referred to are illegal, in the sense that they cannot be enforced; and on this ground, also, I think the society not within s. 44, as not being "for a purpose not illegal." Whatever the inclination of my opinion, it is unnecessary to decide whether the illegality of any of the rules would taint the whole, because here the illegal objects formed not a small part, but a principal, if not the whole, object of the society.

MELLOR, J. I am also of the same opinion. I desire to express no opinion as to whether the rules referred to are illegal in the sense of being criminal. Some of the substantial objects of the society are those of a trades' union, and for the maintenance of its members when on strike, and these objects cannot be separated from the other objects, if any, of the society. Nor can I doubt that many members joined the society on the very footing that there were such rules and for the very sake of the illegal objects. As my Lord and my Brother Blackburn have said, although some of the objects of the society may be those of a friendly society, yet these other and substantial objects of a trades' union are not analogous to those of a friendly society, not being benevolent; and the rules not being legal in the sense of enforceable at law, on the principle of the decision in *Hilton* v. *Eckersley* (1), the society was not within the act, and the magistrates had no jurisdiction over the case.

LUSH, J. I am entirely of the same opinion. One main purpose of the society, if not the main purpose, was to form a trades' union. That being so, the purpose of the society was not analogous to that of a friendly society; and further, this purpose was illegal, in the sense that it was a purpose which could not be enforced in a court of law.

Judgment for the respondent.

Attorney for appellant: *Chinery, for W. P. Roberts, Manchester.*

(1) 6 E. & B. 47, 66; 24 L. J. (Q.B.) 353; 25 L. J. (Q.B.) 199.

BRYANT *v.* FOOT, CLERK.

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Jan. 23.

Immemorial Custom—Prescription—Marriage Fee—Rankness.

From the year 1808 to the present time the fee paid on the celebration of a marriage in a parish church was proved to have been almost uniformly 13*s.* There was no evidence extending beyond 1808:—

Held by Cockburn, C.J., Mellor and Lush, JJ., that the amount of the fee, being so great as to lead to the irresistible inference that it could not have existed in point of fact in the time of Richard I., was sufficient in itself to rebut the presumption, arising from modern enjoyment, that the fee had an immemorial legal existence.

By Blackburn, J., that the doctrine of rankness is confined to moduses; and that the large amount of a customary payment, shewn to have been in fact taken as of right as long as living memory or evidence goes, is not enough to rebut the presumption that the usage had a legal origin.

AN issue was directed by Blackburn, J., to try the question whether 13*s.* (or 10*s.* for the rector and 3*s.* for the clerk) was the legal fee or accustomed duty payable on the celebration of a marriage in the parish church of Horton, in the county of Bucks, or whether there was on such marriage any legal or accustomed fee, and if any, of what amount.

On the trial of the issue a special case was ordered to be stated for the opinion of the Court.

As far back as the year 1808, and from that year down to the year 1854, the fee paid on the marriage of a man and a woman in the parish church of Horton (except in the cases specified, and exclusive of the fee paid for publication of banns) was either 13*s.* 6*d.* or 13*s.* But the fee most frequently paid on such marriages during the above period was 13*s.*, that is, 10*s.* for the rector and 3*s.* for the clerk.

The defendant gave evidence of thirty marriages which had been solemnized in the parish church during the period from 1808 to 1854; and he proved that in twenty one of the thirty cases (which had happened in years 1814, 1822, 1823, 1827, 1829, 1833, 1843, 1844, 1846, 1849, and 1850 respectively) the fees paid were 13*s.* (that is to say, 10*s.* for the rector and 3*s.* for the clerk), and that in nineteen of the twenty one cases 3*s.* had been paid for the banns; that in six of the thirty cases (which had happened in the years 1808, 1827, 1828, 1833, 1837, and 1848 respectively) the fees paid were

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13*s.* 6*d.*; and that in three of the six cases 2*s.* 6*d.* had been paid for the banns; and that in two of the thirty cases (one of which happened in the year 1828, and the other in the year 1840) the fees paid were 13*s.* 6*d.*, and 3*s.* for the banns; and that in one of the thirty cases (which happened in the year 1828) the fees paid were 12*s.* 6*d.*, and 3*s.* 6*d.* for banns. And the plaintiff proved the following cases, viz. one case in 1815, in which the fees paid were 10*s.* 6*d.*, and 3*s.* for the banns; one in 1830, in which the evidence left it doubtful whether the fees paid were 13*s.*, and 3*s.* for the banns, or 13*s.* 6*d.*, and 2*s* 6*d.* for the banns; one in 1834, in which the fees paid were 16*s.* 6*d.*, and 3*s.* for the banns; one in 1847, in which the fees paid were 17*s.* 6*d.*, and 3*s.* for the banns; one in 1853, in which the fees paid were 17*s.*, and 3*s.* for the banns.

In five of the thirty cases proved by the defendant there was not any evidence as to what sums had been paid for the banns, nor did it appear whether, or in what proportions, the money had been divided between the rector and the clerk, in any case in which the fee paid on a marriage in the church had been more or less than 13*s.*

There was not any evidence as to what fees had been paid on marriages in the church prior to the year 1808.

In the year 1849, the Reverend William Brown, who was then, and had been for many years, rector of the parish, caused to be hung up in the vestry of the parish church of the parish, a table of fees with this heading: "Table of fees to be paid in the parish of Horton, county of Bucks;" and in that table there are (inter alia) the following entries:

For a marriage by banns, with certificate of marriage	10*s.* 0*d.*
For the publication of banns of marriage . . .	3*s.* 0*d.*
For a certificate of marriage, baptism, or burial	2*s.* 6*d.*

In the year 1854, the defendant became rector of the parish of Horton; since he so became rector, up to the present time, thirty four marriages have been solemnized in the parish church for the parish, and during all that time the fee paid for a marriage in the church (exclusive of a fee of 3*s.* for publication of banns) has been uniformly 13*s.*, that is, 10*s.* for the rector, and 3*s.* for the clerk.

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The fees paid on marriages in the parish church of the parish have been sometimes paid during, but most frequently after, the ceremony.

Where the parties have applied for a certificate of marriage immediately after the ceremony, it has been invariably given to them free of charge. If it was not applied for at that time, it has been given on application at any time thereafter on payment of a fee of 2*s.* 6*d.* In the majority of the neighbouring parishes the fees paid on marriages in the churches of those parishes respectively are considerably less than those which have been usually paid on marriages in the parish church of the parish of Horton. But in some of the neighbouring parishes the fees are the same, and in one or two they are somewhat larger.

The Court having liberty to draw all inferences of fact, the question for the opinion of the Court was, how, upon the facts stated, the verdict is to be entered upon the issue.

16 Jan., 1866. *Mellish, Q.C.* (*Keane, Q.C.*, and *Macnamara* with him), for the plaintiff. In order that there should be a valid custom to pay a fee to the rector on the celebration of every marriage in the parish, the amount of the fee must be certain, reasonable, and have been paid from time immemorial. By common right, no fee is payable to the parson on a marriage; it is demandable only where a custom exists in a particular parish, and it is then recoverable in a court of common law, the spiritual court not being competent to try a custom: *Spry* v. *Gallop* (1); *Patten* v. *Castleman.* (2) It is very doubtful whether in Roman Catholic times a fee could be claimed on the celebration of a marriage: Johnson's Ecclesiastical Laws, 1200. 8; it would appear that at that time, "if anything was accustomed to be given, the ordinary of the place would do justice in the matter afterwards:" Burn Eccl. Law, Marriage, 480; the custom, therefore, must have originated since the Reformation, and could not have existed from time immemorial. The case finds that the amount of the fee has varied from time to time; it is not, therefore, certain; a custom to be valid must be certain, as in *Mounsey* v. *Ismay* (3), where a

(1) 16 M. & W. 716. (2) 1 Lee's Eccles. Cases, 387.
(3) 1 H. & C. 729; 32 L. J. (Ex.) 94.

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custom to hold horse-races was held good because it was limited to one day in the year; but on the assumption that the fee is 13*s.*, it is so large and so rank, that it could not have existed from time immemorial. If the value of money be considered, 13*s.* at the time of Richard I., must have been equivalent to about 20*l.* at the present day. It is obvious that the fee was rank at the time of Richard I., if it is rank now. The legislature in 1836, in passing the 6 & 7 Wm. 4, c. 85, s. 22, thought a fee of 10*s.* on a marriage by licence, and 5*s.* on a marriage without licence, a reasonable fee to be paid on marriages before the registrar; a fee, therefore, of 13*s.* might be with reason considered unreasonable and rank at the present day. The doctrine of rankness in a modus is a mere rule of evidence, and not a rule of law: 2 Bl. Com. p. 30; Eagle on Tithes, vol. ii. 185; *Pyke* v. *Dowling* (1); and a judge would have to leave the question to the jury whether the fee would be rank in the time of Richard I.; and here the Court can reasonably draw the inference that the fee was rank at its origin.

19 Jan., 1866. *O'Malley, Q.C.* (*A. J. Stephens, Q.C.*, and *Prideaux* with him), for the defendant. It is not necessary to prove that the customary fee was actually due in the reign of Richard I.; it is sufficient that the custom might have existed. A custom to pay a fee may be good although the amount of the fee may have varied at different times, for a fee need not necessarily be of a fixed and ascertained, but may be of a reasonable amount: *Shephard* v. *Payne* (2); and though the case was affirmed in the Exchequer Chamber (3), on another ground this doctrine was not overruled. The Court of Exchequer Chamber, in that case (4), adopted the rule laid down by Parke, B., in *Jenkins* v. *Harvey* (5), "that the correct mode to direct a jury is to tell them that from uninterrupted modern usage they should find the immemorial existence of the payment (if that is necessary for its validity), unless some evidence is given to the contrary." In *Jenkins* v. *Harvey* (6), a custom to pay a toll of 4*d.* per cauldron for measuring coals brought into the port of Truro,

(1) 2 W. Bl. 1257.
(2) 12 C. B. (N.S.) 414; 31 L. J. (C.P.) 297.
(3) 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158.
(4) 16 C. B. (N.S.) at p. 135; 33 L. J. (C.P.) at p. 161.
(5) 1 C. M. & R. at p. 894.
(6) 1 C. M. & R. 877; 2 C. M. & R. 393.

was held valid. In *Rex* v. *Joliffe* (1) an uncontradicted usage for twenty years was held to be good evidence of a custom existing from the time of legal memory. No doubt the doctrine of rankness is a question of fact and not of law, but it is confined to the case of modus. Tithes were claimed in respect of specific things, and if the amount of the composition exceeded the value of the tithes at the time of Richard I., the modus was rank; but that argument can have no application to the present case.

Mellish, Q.C., in reply. In *Jenkins* v. *Harvey* (2), the toll was held not to be rank, on the ground that it was due for the use of the port, as well as for measuring the coals; and it appears that it would have been rank if it had been exacted for measuring the coals only. This case is an authority that the doctrine of rankness is not confined to tithes alone. In *Rex* v. *Joliffe* (1), from the nature of the case, the question of rankness could not be raised. In *Shephard* v. *Payne*, in the court below (3), the question whether the amount of the fee was rank was raised, but not decided; but in the court above (4) the question was not even mooted. There is no authority that the doctrine of rankness only applies to the case of modus.

Cur. adv. vult.

Jan. 23. The following judgments were delivered:

MELLOR, J. The question raised upon the special case is, whether the sum of 13*s.*, viz. 10*s.* for the rector, and 3*s.* for the clerk, is the legal fee or accustomed duty, payable on marriage, in the parish church of the parish of Horton, in the county of Bucks. By the order of nisi prius, under which the case was directed to be stated, it was ordered that the Court should be at liberty to draw all inferences of fact.

It appears from the case, that from the year 1808 to the year 1854, the fee actually paid was either 13*s.* 6*d.* or 13*s.*, with an occasional additional sum, varying from 2*s.* 6*d.* to 3*s.* 6*d.* for the publication of banns. Upon the argument before us it was urged,

(1) 2 B. & C. 54.
(2) 2 C. M. & R. 393.
(3) 12 C. B. (N.S.) 414; 31 L. J. (C.P.) 297, 9 Jur. N.S. 354.
(4) 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158; 10 Jur. N.S. 540

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on the part of the plaintiff, that there is no accustomed legal fee or duty payable to the parson and clerk in the parish of Horton on the celebration of marriages, or that, at all events, the fee of 13*s.* 6*d.*, or 13*s.*, is unreasonable and void.

The duty cast upon the Court by the order of nisi prius is to draw such inferences from the facts stated as a jury under ordinary circumstances would be required to draw from them, guided by an appropriate direction from the judge presiding on the trial. The actual question to be determined is, whether the fee or duty of 13*s.* 6*d.*, or 13*s.*, claimed as the fee payable on marriage, in the parish of Horton, can be, and ought to be, presumed to have had, under the circumstances, a legal origin: in other words, ought a jury to infer from the facts stated that the fee or duty had its origin in some custom or convention existing in the parish of Horton before the time of legal memory? The rule applicable to such questions in general is accurately stated by Blackburn, J., in delivering the opinion of the majority of the judges in the Court of Exchequer Chamber, in the case of *Shephard* v. *Payne* (1): "In favour of vested interests, and for quieting of titles, the rule of evidence has been established, that where there has been long continued modern user of a right capable of a legal origin, the existence of that legal origin should be presumed unless the contrary be proved. This presumption is not one juris et de jure, which cannot be rebutted, but neither is it one purely of fact, and only to be drawn when the jury really entertain the opinion that, in fact, the legal origin existed. The true rule seems to be laid down by Lord Wensleydale, then Parke, B., in *Jenkins* v. *Harvey* (2), where he says that the correct mode to direct a jury is to tell them that, from uninterrupted modern usage, they should find the immemorial existence of the payment (if that be necessary for its validity), unless some evidence is given to the contrary; or, as he says, in delivering the written judgment of the Court, in the second trial of the case, from proof that an office existed in 1752, the jury may and ought to find it to be prescriptive, if that be necessary to make it valid, *unless the contrary be proved.*"

If the circumstances of the present case do not differ from those

(1) 16 C. B. (N.S.) at p. 135; 33 L. J. (C.P.) at p. 160; 10 Jur. N.S. 543.

(2) 1 C. M. & R. at p. 894; 2 C. M. & R. at p. 407.

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of *Jenkins* v. *Harvey* (1) and *Shephard* v. *Payne* (2), we have only to follow the rule laid down in those cases, and declare the fee or duty claimed to be a valid fee. It was, however, contended that the circumstances of the present case do essentially distinguish it from *Jenkins* v. *Harvey* (1) and *Shephard* v. *Payne* (2); and it was said that, in order to support the fee or duty in the present case, we must infer that it had its origin in some custom or convention existing in the parish of Horton before the time of legal memory, and that the rankness of the amount claimed afforded the "*strongest proof*" that it could not possibly have had any such origin.

With some hesitation I have come to that conclusion, and think that the rankness of the amount is destructive of the claim. From the rule laid down by Parke, B., in the case of *Jenkins* v. *Harvey* (3), and from that more elaborately stated by Blackburn, J., in *Shephard* v. *Payne* (4), it appears that, in general, the presumption that the payment is immemorial is to be made, "unless some evidence is given to the contrary," or "unless the contrary be proved."

I think that the rankness of the fee or duty claimed meets and fulfils the qualification so stated. It is true that the question of rankness generally arises in the case of modus, but I am not aware that it is a rule peculiar to that subject-matter; and it certainly does not appear to have been so considered in the case of *Jenkins* v. *Harvey* (5), where a toll was contended to be rank, and although it was upheld by the Court, as a toll or due *for the use of the port*, it was not suggested that the rule as to rankness was inapplicable to such a claim; and in *Traherne* v. *Gardner* (6), in an action to recover back certain fees alleged to have been improperly received by the steward of a manor, Lord Campbell is reported to have said: "It is clear that no customary fee has been proved. A fee of 13*s.* 4*d.* clearly is rank. No such fee could have been paid in the time of Richard I., and the payments have, in fact, varied, and have risen to an amount which must be repressed."

It is said by Mr. Justice Blackstone (2 Com. p. 30), that, in the

(1) 1 C. M. & R. 877.
(2) 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158, 10 Jur N.S. 540
(3) 1 C. M. & R. at p. 894; 2 C. M. & R. at p. 407.
(4) 16 C. B. (N.S.) at p. 135; 33 L. J. (C.P.) at p. 160, 10 Jur N.S. 543.
(5) 2 C. M. & R. at p. 407.
(6) 5 E. & B. at p. 940; 25 L. J. (Q.B.) at p. 205, 2 Jur N.S. 397.

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case of a modus, rankness is a mere rule of evidence, drawn from the improbability of the fact, and is not a rule of law; and further on he says (p. 31): "If the modus set up is so rank and large as that it beyond dispute exceeds the value of the tithes in the time of Richard I., this modus is, in point of evidence, felo de se, and destroys itself;" and Mr. Eagle, in his book on Tithes, vol. ii. p. 186, says that the objection of rankness, in case of modus, is "allowed to *prevail against the uniform proof of usage*, during the time of living memory, *without any other evidence of the fact than the mere amount of the payment itself*." And again, in speaking of the practice of the courts of equity in such cases, he says that: "By their constitution they have an undoubted right to decide the fact, as well as the law of the case, and that they are bound to overrule a modus, where they see that the internal evidence against its immemorial existence is so strong that it would be nugatory and oppressive to send it to be tried by a jury." A fee or duty of 13*s.* or 13*s.* 6*d.* appears to be a very large fee payable on marriage, even at the present day. When we consider the average rate of wages in agricultural parishes, the fee demanded would probably more than exhaust a week's earnings of an agricultural labourer; and it is to be observed that the legislature, in the year 1836, when the Marriage Act, 6 & 7 Wm. 4, c. 85, was passed, settled (by s. 22) the fee payable to the registrar for every marriage, if by licence, at 10*s.*, and if otherwise, at 5*s.* This appears to me to be strong to shew that the fee, as a customary fee, is large even at the present day.

If then apparently large at the present day, what must it have been in the time of Richard I., when, upon an inquisition in 1194, the price directed to be set upon a bull was 4*s.*, upon a cow the same, upon a plough-horse the same, upon a sheep with fine wool 10*d.*, upon a sheep with coarse wool 6*d.*, upon a sow 12*d.*, and upon a boar 12*d.* (1) It cannot be doubted that, if we are at liberty to enter upon the historical inquiry, and are not precluded by some arbitrary rule from doing so, the result must be fatal to the fee or duty claimed. Its effect must have been almost to prohibit marriage in the parish of Horton, at a time when marriage was considered as a sacrament, and it was the policy alike of law and

(1) Annals of Roger de Hovenden, by Riley, vol. ii. p. 337.

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religion to encourage it. Is it then possible to treat the present as a case in which the presumption of a legal origin ought to be drawn, although as a mere matter of fact we may not be satisfied of it? I confess that it appears to me that the presumption ordinarily to be made is actually rebutted by the irresistible inference arising out of the rankness of the amount. Common sense revolts at the idea that a fee of such amount could have existed in the time of Richard I.; and, under such circumstances, I cannot merely say that I am not satisfied that it existed, but I am compelled to say that I am satisfied that it did not and could not have existed.

In coming to the conclusion that the fee or duty claimed in the present case is bad for the reasons above stated, are we at all in conflict with the decision in *Shephard* v. *Payne*? It appears to me that we are not. In the Court of Common Pleas, Willes, J., in delivering the judgment of the Court (1), says: "He (Mr. Wills) argued that, considering the increase in the value of money since the epoch of legal memory, the claim was rank. This reasoning, however, if applicable to such a fee, is not conclusive of the present case; for a fee need not be of a fixed and ascertained, but may be of a reasonable amount, and, exercising the power conferred upon us by the case to draw inferences of fact, we may conclude that, if the claim can be sustained in point of law, it was in fact for a reasonable fee;" and in discussing the nature of the duty in respect of which the claim in that case arose, he says: "The visitation of the archdeacon must, for this purpose, be considered as for the *benefit of the parish at large*, and, amongst others, of the churchwardens themselves, the performance of whose duties besides is facilitated by the services of registrars."

In the Court of Common Pleas the question of rankness, if applicable, was disposed of by the finding of the Court, that the claim was "for a reasonable fee." When that case came before the Court of Error (2), Bramwell, B., supported the fee for the reason given by the Court below, although the other judges present, without dissenting from the reasons stated by Willes, J., in delivering the judgment of the Court below, based their opinion on the ground

(1) 12 C. B. (N.S.) at pp. 433, 434; 31 L. J. (C.P.) at pp. 304, 305.

(2) 16 C. B. (N.S.) at p. 136; 33 L. J. (C.P.) at p. 161.

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that, under the circumstances of that case, the fees in question should be presumed to be "immemorial fees attached to the office of registrar."

No point as to rankness was made by the learned counsel who argued in the Court of Exchequer Chamber, and the attention of the Court was not called to it; but the case was argued mainly on the question, whether there could be a fee varying "in pecuniary amount from time to time with the value of money and other circumstances, subject only to the restriction that it should be reasonable."

The fees there claimed were from the churchwardens, representing *the entire parish*, and not from individual parishioners, and therefore properly there was no real ground for imputing rankness to that payment. I think that that decision does not govern the present case, and that we are bound to consider the amount of the fee as creating an improbability so great that it could have existed before the time of legal memory, that no jury, rightly directed, could properly have come to any conclusion affirming its existence.

If, therefore, in favour of vested interests, an arbitrary rule of limitation and prescription is to be laid down which shall render the historical inquiry unnecessary, let it be done by the legislature; but so long as a fee or duty depends upon prescription, it appears to me that we ought not to presume a legal origin for a payment against an absolute conviction that it never did or could exist before the time of legal memory. Our judgment must be for the plaintiff.

BLACKBURN, J. In this case the question is, whether it is proved that a fee is due to the rector of Horton on the marriage of a man and woman in the parish church of that parish. The evidence has been taken by an arbitrator, and stated in a case, on which this Court is to determine whether there is such a legal fee or not, the Court having power to draw all inferences of fact.

The substance of what is found is, that there is no evidence at all of what was the practice before the year 1808, but that, from that year down to the commencement of the present dispute, a fee of 13*s.*, viz. 10*s.* to the rector and 3*s.* to his clerk, has been almost uniformly paid; in a few instances the sum has been slightly larger,

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and in one instance—and in one only—it was less than 13*s.*, being in that case 10*s.* 6*d.* I think the fair inference of fact to be drawn from this is, that, as far back as living memory goes, the fee of 13*s.* has been taken in this parish as a fee of right payable on a marriage; and I have no hesitation in drawing the inference of fact that the same fee was taken before 1808, when the evidence begins, though there is no further proof of that fact than that it was taken then and ever since.

Marriage fees are not due of common right, but by immemorial custom in a parish a reasonable fee may be due there. This was not disputed on the argument; the contention on the part of the plaintiff was, that the evidence here established the fee of 13*s.* or none, and that 13*s.*, which, even in modern times, is a considerable fee, must in the times before legal memory—that is to say, before 1189, in which year Richard I. began to reign—have been so excessive that this Court, as a jury, ought, in analogy to the cases in which moduses have been upset on the ground of rankness, to draw the conclusion of fact that the fee originated since, or ought, as a court of law, to hold the custom bad, on the ground that such a fee was then at least excessive and unreasonable.

If this issue had gone to trial in the ordinary way, I think the question must have been left to the jury. I think that the judge must have told them that, where a right is shewn to have been enjoyed by usage as of right as far back as evidence goes, a presumption is raised in favour of that right, that, if it could have a legal origin, it in fact had one; and therefore that, in this case, a presumption arose on which they would be warranted in finding this fee to have been taken before the time of legal memory; but I think that he must also have told them that the presumption was not one of law, but was a presumption of fact, capable of being rebutted, and that the amount of the fee was some evidence against that presumption. It would be proper in him to give them advice as to the degree of weight that they should give to the presumption in favour of the long continued usage, and how much they should require to be proved in order to rebut it; and as the jury would on such a point be properly much influenced by the advice thus given, probably the verdict would in substance be determined by the opinion of the judge. In the present case, where the judges

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themselves are to find the facts, the whole question, in my mind, depends on what is the advice that should thus be given by us as judges to ourselves as jurors. Now, if the proper consideration is merely whether the same usage proved to have long continued in modern times did *in fact* prevail before the reign of Richard I., I think very few prescriptive rights could be established.

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No doubt usage for the last fifty or sixty years would be some evidence of usage 700 years ago, but if the question is to be considered as an ordinary question of fact, I certainly for one would very seldom find a verdict in support of the right as in fact so ancient. I can hardly believe, for instance, that the same fees in courts of justice which were till recently received by the officers as ancient fees attached to their ancient offices were in fact received 700 years ago; or that the city of London took before the time of Richard I. the same payments for measuring corn and coals and oysters that they do now. I have no doubt the city of Bristol did levy dues in the Avon before the time of legal memory, and that the mayor, as head of that corporation, got some fees at that time; but I can hardly bring myself to believe that the mayor of Bristol at that time received 5*s.* a year from every ship above sixty tons burthen which entered the Avon; yet the claim of the city of Bristol to their ancient mayor's dues, of which this is one, was established before Lord Tenterden, in 1828. I think the only way in which verdicts in support of such claims, and there are many such, could have properly been found, is by supposing that the jury were advised that, in favour of the long continued user, a presumption arose that it was legal, on which they *ought* to find that the user was immemorial, if that was necessary to legalize it, unless the contrary was *proved;* that presumption not being one purely of fact, and to be acted on only when the jury really entertain the opinion that in fact the legal origin existed. This was stated by Parke, B., on the first trial of *Jenkins* v. *Harvey* (1), as being his practice, and what he considered the correct mode of leaving the question to the jury; and that was the view of the majority of the judges in the Court of Exchequer Chamber in *Shephard* v. *Payne.* (2) This is by no means a modern doctrine; it is as ancient as the

(1) 1 C. M. & R. at p. 894.

(2) 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158. 16 Jur 1540

time of Littleton, who, in his Tenures, s. 170, says that all are agreed that usage since the time of Richard I. is a title; some, he says, have thought it the only title of prescription, but that others have said "that there is also another title of prescription that was at the common law before any statute of limitation of writs, &c., and that it was where a custom or usage or other thing hath been used for time whereof mind of man runneth not to the contrary. And they have said that this is proved by the pleading where a man will plead a title of prescription of custom. He shall say that such custom hath been used from time whereof the memory of men runneth not to the contrary, that is as much as to say, when such a matter is pleaded, that no man then alive hath heard any proof of the contrary, nor hath no knowledge to the contrary; and insomuch that such title of prescription was at the common law, and not put out by any statute, ergo, it abideth as it was at the common law; and the rather that the said limitation of a writ of right is of so long time passed. Ideo quære de hoc."

It is practically the same thing whether we say that usage as far back as proof extends is a title, though it does not go so far back as the year 1189; or that such usage is to be taken in the absence of proof to the contrary to establish that the usage began before that year; and certainly the lapse of 400 years since Littleton wrote has added force to the remark, "the rather that the limitation of a writ of right is of so long time passed." But either way, proof that the origin of the usage was since that date, puts an end to the title by prescription; and the question comes round to be whether the amount of the fee, viz. 13*s.*, is by itself sufficient proof that it must have originated since. In *Shephard* v. *Payne* (1), the Court of Common Pleas dealt thus with this argument, founded on the facts of that case, that there was evidence that the fee had varied in amount, and that considering the increase of the value of money since the epoch of legal memory, the claim was rank. "This reasoning, however, if applicable to such a fee, is not conclusive of the present case; for a fee need not be of a fixed and ascertained, but may be of a reasonable amount; and exercising the power conferred upon us by the case to draw inferences of fact, we may conclude that if the claim can be sustained in point of law, it

(1) 12 C. B. (N.S.) at p. 433; 31 L. J. (C.P.) at p. 304, 9 John R. Salk. 358.

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was in fact for a reasonable fee." There are, no doubt, authorities to the effect that prescriptive claims must be certain; and those authorities made some of the judges in the Exchequer Chamber unwilling to affirm this doctrine unnecessarily; but they did not dissent from or overrule it, and my Brother Bramwell preferred to base his judgment, affirming that of the Common Pleas, on their reasoning, rather than on that which seemed to the majority of the Exchequer Chamber to render it unnecessary to decide the point. I think that if a custom before legal memory to take a reasonable fee, which in process of time has got taxed and fixed at 13*s.* is good, the doctrine is as applicable in the present case, where the fee is payable by the individual parishioner, as in *Shephard* v. *Payne* (1), though the fee was there payable by the parish officer on behalf of the whole inhabitants.

But even on the supposition that the law requires an immemorial fee, in order to be valid, to have been at all times fixed in moneys numbered, I think that, in accordance with the general practice of judges for many years, we ought to advise ourselves as jurors to give such weight to the presumption arising from long continued enjoyment as to find the usage immemorial, unless there is proof shewing clearly that it could not be. The cases before Lord Tenterden's Prescription Act are to be found collected in Serjeant Williams's note to *Yard* v. *Ford.* (2) They shew that though enjoyment for a period falling short of that since legal memory was not a title, but only evidence of a title, yet juries were directed to find such a title, though they never could have believed it existed in fact. This had gone so far that in *Penwarden* v. *Ching* (3), where there was a plea of "an ancient window," and the evidence shewed that the window was only twenty two years old, Tindal, C.J., refused to direct a verdict on the ground of the variance, saying, "The question is not whether the window is what is strictly called ancient, but whether it is such as the law in indulgence to rights has in modern times so called, and to which the defendant has a right, for this is the substance of the plea." This ruling, perhaps, might be questioned, but it shews what, in the opinion of a very learned and cautious pleading judge, was the

(1) 12 C. B. (N.S.) 414; 31 L. J. (C.P.) 297.

(2) 2 Wms'. Saund. 174.

(3) M. & M. 400.

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substantial question. The Prescription Act has in many cases rendered it unnecessary to resort to the old doctrine, but in such a case as the present we must do so, and inquire whether the plaintiff has satisfied the onus cast on him of rebutting the presumption arising from continued enjoyment, merely by the argument arising from the amount of the fee.

I must first observe, that though in many cases the amount of a modus, or, as it is called, its rankness, was held sufficient to rebut the proof of its antiquity, yet, as far as I know, that reasoning has never been acted on in any case except that of a modus decimandi; for what is said by Lord Campbell in *Traherne* v. *Gardner* (1) is entirely obiter. At the same time, I must acknowledge that I do not see on what principle it could properly be evidence on which the jury might properly be advised to act in such a case and not in others.

But I think the evidence against the antiquity of a right arising from the change of the value of money very unsatisfactory. From what was said by Parke, B., in delivering judgment in the first case of *Jenkins* v. *Harvey* (2), "Upon the correctness of the reasoning drawn from the fact of the value of money, great doubt may be entertained," he seems to have participated in this opinion. We know, indeed, that the coinage has since the reign of Richard been altered, so that the coins which represent a certain number of what we now call shillings, contained less silver than the coins which at that time represented an equal amount of what were called shillings in that reign. I believe that the coins equivalent to 20*s.* in the reign of Richard I., when new, ought to have contained as much silver as 58*s.* at present; but if I am to enter into this question, I think a considerable deduction ought to be made on this head, for I do not believe that the coins in actual currency at that time were "plump." I think it probable that they were much clipped and sweated, so that their exchangeable value was considerably below what it ought to have been. I also believe that silver was scarcer in those days than now, so that as a general rule commodities would exchange for less silver than now, and the country was no doubt much poorer than now, so that for all these reasons

(1) 5 E. & B. at p. 940; 25 L. J. (Q.B.) at p. 205.

(2) 1 C. M. & R. at p. 894.

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a fee of 13*s.* in those days would be much more difficult to come at than a fee of the same nominal amount now. But when on this the conclusion is based that a particular payment for a particular thing could not have been ancient, I think we make a rash leap in the dark. Many things were in that time so much rarer than they are now, that they commanded a far higher price. Thus, in Magna Charta, 9 Henry 3, c. 21, "the old price limited for carriage" is declared to be for carriage with two horses, 10*d.* per day; for three horses, 14*d.* per day: so that the hire of an additional horse for a day would seem to have been 4*d.* In 13 Geo. 3, c. 78, s. 38, the commutation for statute labour is fixed "for a cart and one horse, or beast of draught, 2*s.*, and for every cart and two horses, or beasts of draught, 3*s.*," so that the hire of an additional horse was 1*s.* It would be a very rash conclusion that the proportion between the value of money in 1773 and money of the same nominal value before legal memory was not more than three to one; but I think it clear that it would be a rash inference, and in the case of the hire of carriage a wrong one, that a scale of price that bore so high a proportion could not be ancient. I think the probable solution of this is, that carriage in the old times was scarce, and therefore commanded a high price. But why are we, without any reason that I know of, to conclude that priests were then common, and that their services commanded a low price? In many of the cases in which moduses have been upset, the assumption seems to have been that, in making a bargain with the tithe-payers, the parson must necessarily have had the worst of the bargain; that if, on looking at the price, it appeared that, if the bargain was really made before legal memory, he must have made an extortionate bargain, that was an impossibility. Why should we say that the clergy before the time of Richard I., backed as they were by all the power of the state and the papacy, should not often have succeeded in establishing large fees?

I may remark also, that as the marriage was first performed, and then the payment of the fee enforced by ecclesiastical censures, and not otherwise, it is probable that the fees were in practice remitted where the parties were poor, but I do not much rest on this. I do not at all doubt that the value of money has changed since 1189, and to such an extent that most payments which it is

now worth while to collect, must have been at that time very high, and I do not dispute that this affords a fair ground for an antiquary to conclude that most of the payments now taken as ancient have either begun or been increased since the date of legal memory. But I find no cases, except those of moduses, in which the amount of the payment has alone been held sufficient to rebut the presumption of immemorial antiquity; and there are so many vested rights that have been undisputed, or if disputed, established, though the rankness, if a sufficient objection, would be patent, that I think the cases as to moduses must be taken to establish an exception from the general rule—an anomalous and illogical exception, I agree—and that, in all other cases, the course of the judges has been, not to direct juries to consider the rankness or large amount of a customary payment, shewn to have been in fact taken as of right as long as living memory or evidence goes, as alone enough to rebut the presumption that the usage had a legal origin. The effects of a contrary decision on vested interests will be very startling; for there can seldom be a payment of sufficient amount to make it worth while to collect in modern times, and yet not so large as to be open to the objection of rankness. I think that the judges, from the time of Littleton downwards, have been desirous to make the law reasonable and practically just, and have, to some extent, succeeded in this, and though this may have been originally a judicial usurpation, I am very unwilling to undo what they have done, and recur to antiquated unreason. I think, therefore, that in finding the facts in this case, I ought to give so much weight to the presumption in favour of the vested enjoyment as of right, and so little to the change in the value of money, that I ought to find this usage immemorial, and this fee ancient. If the fact that the fee is ancient be once found, then I think the Court, as a matter of law, must make every presumption in favour of it, if it could have a legal origin. I think, therefore, that our judgment ought to be in favour of the defendant.

COCKBURN, C.J. The question in this case is, whether a claim, made by the rector of the parish of Horton to a fee of 10*s.* for himself and 3*s.* for the clerk on the celebration of every marriage in the parish church, can be upheld in law. I am of opinion that

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it cannot. It is clear that a fee on the celebration of marriage in a parish church can only be claimed by virtue of an immemorial custom in the parish, and the question is, whether the evidence establishes the existence of a custom in the parish of Horton for the payment of this fee from the time of legal memory.

It appears that from the year 1808 to the time of bringing this action, a fee has been invariably paid on the celebration of marriage in this parish. In a considerable majority of instances the fee paid was 10*s.* for the rector and 3*s.* for the clerk; in a few instances, the fee to the rector was 12*s.* 6*d.*, to the clerk 2*s.* 6*d.* In a small number of instances the fee to the rector was still higher. Now, though it is laid down that it is essential to the validity of a custom that it shall have been uniform, I think, upon the whole, it may be taken that from the year 1808 downwards, a fee of 13*s.* has been customary in this parish, although, in a few instances, a larger fee has been paid. Taking it, therefore, that the custom to pay the fee now claimed is shewn to have existed since the year 1808, it would primâ facie follow, according to the established rule as to presumption in such cases, that we ought to presume the previous existence of the custom for an antecedent period extending as far back as the time of legal memory.

But it is equally clear that this rule must be taken with this important qualification, that it can only be applied when the presumption of immemoriality is not rebutted, either by proof of the actual origin of the custom since the time of legal memory, or by its appearing that the custom could not possibly have existed at that date. In either of these cases the presumption is inadmissible, and the custom, whatever may have been its duration, has no binding validity in law. Furthermore, it is immaterial whether the impossibility of the origin of the custom having been beyond the time of legal memory is shewn by extrinsic evidence, or is to be gathered from the nature of the alleged custom itself; as where, in the case of an alleged customary payment, the amount is so large as to make it impossible that such a payment can have been established as far back as the reign of Richard I.

Now, when it is borne in mind that the parish of Horton is a rural parish, inhabited principally by agricultural labourers, and the fee of 13*s.* on the celebration of marriage is even in our day

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for people of this class a very high fee, it seems quite impossible to believe, looking to the relative value of money in the twelfth century and at the present day—even if the disproportion be taken at the most moderate rate—that such a payment can have been exacted and submitted to in the reign of King Richard. Without entering into any speculative discussion on this subject, it is enough to refer to the Statute of Labourers (1) to be satisfied that, looking to the rate of wages fixed thereby, the payment of such a fee at that period is altogether out of the question.

The question is, whether under these circumstances we are called upon to do violence to our consciences, both as judges and jurymen—for we are judges of fact as well as of law in this case—by holding that this custom dates back to the time of legal memory, when we are convinced that such cannot be the case.

I readily admit that the law which requires prescription or custom to be carried back for a period of nearly 700 years is a bad and mischievous law, and one which is discreditable to us as a civilized and enlightened people; but such is the law, and while it so continues I consider myself, in administering it, as bound to administer it as I find it; nor do I feel myself warranted in undermining or frittering it away by subtle fictions or artificial presumptions inconsistent with truth and fact.

The law of England ever has been and still is, in respect of prescriptive rights, in a most unsatisfactory state. The common law admitted of no prescription in the matter of real estate, or of any franchise which was matter of record, as not lying in grant. In respect of things incorporeal, lying in grant, it admitted of a species of prescription, not upon the ground that possession or enjoyment for a given period gave an indefeasible right, but on the assumption, when possession or enjoyment had been carried back as far as living memory would go, that a grant had once existed which had since been lost.

Practically speaking, by means of this presumption prescriptive rights were established in respect of matters which lay in grant. Protection, in respect of real estates, after continued and peaceable enjoyment, was effected, not by the law being that after possession

(1) 25 Edw. 3, st. 1, cc. 1–3, A.D. 1350–1. In the edition of the Statutes of the Record Commission, vol. i. p. 311, the statute is given in English.

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for a given number of years the right of property should be absolutely acquired, but by the indirect contrivance of debarring the adverse claimant from the benefit of the procedure by which alone his right could be established. And here again our ancestors, instead of fixing a given number of years as the period within which legal proceedings to recover real property must be resorted to, had recourse to the singular expedient of making the period of limitation run from particular events or dates. From the time of Henry I. to that of Henry III., on a writ of right, the time within which a descent must be shewn was the time of King Henry I. (1) In the 20th year of Henry III., by the Statute of Merton (c. 8) the date was altered to the time of Henry II. Writs of mort d'ancestor were limited to the time of the last return of King John into England; writs of novel disseisin to the time of the king's first crossing the sea into Gascony. In the previous reign, according to Glanville (2), the disseisin must have been since the last voyage of King Henry II. into Normandy. So that the time necessary to bar a claim varied materially at different epochs. Thus matters remained till the 3 Edw. I. (3), when, as all lawyers are aware, the time within which a writ of right might be brought was limited to cases in which the seisin of the ancestor was since the time of King Richard I., which was construed to mean the beginning of that king's reign (4), a period of not less than eighty six years. The legislature having thus adopted the reign of Richard I. as the date from which the limitation in a real action was to run, the courts of law adopted it as the period to which, in all matters of prescription or custom, legal memory, which till then had been confined to the time to which living memory could go back, should thenceforth be required to extend. Thus the law remained for two centuries and a half, by which time the limitation imposed in respect of actions to recover real property having long become inoperative to bar claims which had their origin posterior to the time of Richard I., and having therefore ceased practically to afford any protection against antiquated claims, the legislature, in 32nd of Henry VIII. (c. 2), again interfered, and on this occasion, instead of dating the period of limitation from some particular event or date, took the wiser course of prescribing a fixed number of years as the

3 QB 516

(1) Co. Litt. 114 b. (2) Lib. 13, c. 33. (3) Stat. West. 1, c. 39. (4) 2 Inst. 238.

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limit within which a suit should be entertained. The legislature having thus altered the period within which rights to real estate could be asserted by parties out of possession, the courts on this occasion omitted to follow the analogy of the recent statute as fixing the date from which legal memory was to commence, as they had done on the passing of the statute of the 3 Edw. I., and adhered in all that related to prescription or custom to the previously established standard. It was of course impossible that as time went on the adoption of a fixed epoch, as the time from which legal memory was to run, should not be attended by grievous inconvenience and hardship. Possession, however long, enjoyment, however uninterrupted, afforded no protection against stale and obsolete claims, or the assertion of long abandoned rights. And as parliament failed to intervene to amend the law, the judges set their ingenuity to work, by fictions and presumptions, to atone for the supineness of the legislature, and to amend, so far as in them lay, the law, which I cannot but think they were bound to administer as they found it. They first laid down the somewhat startling rule that from the usage of a lifetime the presumption arose that a similar usage had existed from a remote antiquity. Next, as it could not but happen that, in the case of many private rights, especially in that of easements, which had a more recent origin, such a presumption was impossible, judicial astuteness to support possession and enjoyment, which the law ought to have invested with the character of rights, had recourse to the questionable theory of lost grants. Juries were first told that from user, during living memory, or even during twenty years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed. In this manner the courts have endeavoured to supply the deficiency of the law in the matter of rights acquired by possession and enjoyment. When the doctrine of presumptions had proceeded far towards its development, the legislature at length interfered, and in respect of real property and of certain

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specified easements, fixed certain periods of possession or enjoyment as establishing presumptive rights. But with regard to all prescriptions or customs not provided for by statutory enactment the law remains as before.

With reference to the doctrine of presumption, Sir William Evans has observed, that though it may be convenient that this doctrine should be adhered to, he "should ever retain the sentiment that the introduction of such a doctrine was a perversion of legal principles, and an unwarrantable assumption of authority": 2 Evans's Pothier, 139.

In this view I entirely concur, and although I may feel bound to follow in the beaten track which prior decisions have marked out, I am not prepared to do violence to my own convictions, or to direct a jury to do likewise, by presuming in any case not governed by positive authority the existence of a state of things which I am satisfied never existed at all. But so far from its having been held that on a claim of customary payment, the fact of such payment having been made as far back as living memory goes must necessarily in all cases lead to the presumption of an immemorial custom, it is well established that, in the case of moduses, the rankness, as it is called, of a modus,—that is, the fact that the amount paid is such, that looking to the comparative value of money, it is impossible that such a sum could have been paid by arrangement between the parson and the parishioners in the time of Richard I.,—is fatal to the modus, as it rebuts the presumption which would otherwise arise from the modern usage. The analogy between the case of payment under a modus and such a payment as the present appears to me to be complete. The doctrine as to rankness being fatal to a modus does not arise from any peculiarity in the nature of a modus. It rests entirely on the fact, that the amount paid is incompatible with the possibility of such a payment having been established as far back as the commencement of the reign of Richard I. I am utterly at a loss to conceive why, if the payment of the fee claimed by the rector in the present case should appear equally rank by reason of its being in excess of what could have been a fee payable on marriages in the parish of Horton in the twelfth century, the same principle should not be equally applicable.

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The case of *Shephard* v. *Payne*, in which the payment of fees to the registrars of an Archdeaconry Court was involved, and which was first before the Court of Common Pleas (1), and afterwards before the Court of Exchequer Chamber (2), is the only authority, so far as I am aware, which may be thought to have a contrary tendency. But in that case, though the question of rankness incidentally arose, the Court of Common Pleas disposed of it by holding that, as it appeared that the amount of the fees taken had varied from time to time, it might be inferred that the custom was not for a fixed payment, but for the payment of a reasonable fee. In that view the question of rankness of course became immaterial. The judgment of the Court of Common Pleas was affirmed by the Court of Exchequer Chamber, but not on the same ground, the Court not having apparently adopted the view—certainly a novel one—of the Court below, that the want of uniformity in the payments—usually thought to be fatal to a payment claimed by custom—warranted the inference to pay such varying amount as might from time to time be reasonable. The Court of Exchequer Chamber, so far as I can gather from the judgment, proceeded on the ground that, though the fees had varied, which circumstance would, primâ facie, be fatal to a customary payment, this objection ought not to prevail, the modern payments having been uniform. The question of rankness does not appear to have entered into the consideration of the Court, or to have influenced the judgment. I consider myself, therefore, fully at liberty to apply to the present case, the principle long since established in cases of modus, that rankness, in an alleged customary payment, is fatal to its validity.

I am fully sensible of the inconvenience which may result from the application of this principle to other instances of customary payments, such as tolls, fees, and the like; but these inconveniences flow necessarily from the vice and badness of the law, which requires that nothing short of an existence for seven centuries shall give validity to a custom, however reasonable in itself; while that law subsists I am bound to act upon it, and though bound by the authority of past decisions to hold, that usage extending as far back as living memory goes, or during a certain

(1) 12 C. B. (N. S.) 414; 31 L. J. (C.P.) 297; 9 Jur. N.S. 334.

(2) 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158; 10 Jur. N.S. 540

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number of years, requires the presumption of immemoriality, I cannot be a party to subverting the law by presuming that which I am perfectly satisfied is, in point of fact, impossible. The utmost length to which the cases have gone is, that to uphold continued possession or enjoyment, a previous possession or enjoyment for an indefinite period, or a lost grant, or the like may be presumed, however improbable it may be that the presumption was well founded. It has nowhere been held that such a presumption is to be made where the thing to be presumed is impossible. Being then convinced that the customary payment claimed by the defendant, the rector, could not possibly have existed in the time of Richard I., and that consequently the custom is not, in the legal sense, immemorial, I feel bound to give judgment in favour of the plaintiff.

LUSH, J. I have had the opportunity of reading the judgments of my Lord and my Brother Mellor, in which I fully concur; and I have not written a judgment of my own, as I felt that I could not usefully add anything to what they have so elaborately expressed.

Judgment for the plaintiff. (1)

Attorneys for plaintiff: *Stephens, Smith, & Co.*
Attorneys for defendant: *Dale & Stretton.*

(1) LAWRENCE *v.* HITCH.

2 CP 476, 484
3 QB 513

THE plaintiff claimed, as lessee of the Lord of the Manor of Cheltenham, to be entitled to a customary toll of 1*s.* for every waggon, cart, horse, or ass load of fruit and vegetables, payable by all persons hawking about and exposing for sale and bringing for sale fruit and vegetables into the streets of Cheltenham.

June 5, 1866. *Mellish, Q.C.* (*Sawyer* and *Harington* with him), argued for the plaintiff.

Macnamara (*J. J. Powell, Q.C.*, with him), for the defendant.

Cur. adv. vult.

January 23. COCKBURN, C.J. The judgment in this case will follow that in *Bryant* v. *Foot.*

BLACKBURN, J. I fully concur in that, as I am bound by the judgment of the majority of the Court; and it is quite impossible that a toll of 1*s.* for every ass load of vegetables could *as a fact* have existed in the time of Richard I.

PER CURIAM.

Judgment for the defendant.

Attorneys for plaintiff: *Aldridge, Bromley, & Co.*
Attorney for defendant: *Burn.*

Rev'd in Ex Ch 3 QB 521

THE BARNSLEY LOCAL BOARD OF HEALTH, APPELLANTS; SEDGWICK, RESPONDENT.

1867
Jan. 23.

Local Board of Health, Proceedings of—Committee—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *ss.* 34, 36, 69, 149—*Notices to pave, &c. Streets.*

Section 36 of the Public Health Act, 1848, enables a local board of health to appoint so many out of their own number to act as a committee, provided the acts of the committee shall be submitted to the board for their approval. By s. 149, whenever the consent, sanction, approval, or authority of the local board is required by the provisions of the act, the same shall, in the case of a non-corporate district, be in writing under their seal and the hands of five of them. By s. 69, if a street be not paved, &c., to the satisfaction of the local board, the board may, by notice in writing, require the owners or occupiers of premises abutting upon the street, to pave, &c., the parts on which they abut within a given time, and in default the board may do the work themselves, and recover the expenses, to be apportioned by the surveyor, from the owners, &c., in a summary way.

A local board of health of a non-corporate district appointed a streets committee, and afterwards passed a resolution that the minutes of the committee resolving that notices be given to pave, &c. certain streets, be approved by the board; this resolution was signed by the chairman, according to the bye laws (made under s. 34). Notices were accordingly sent under s. 69, signed by the clerk to the board, to the owners, and subsequently, on default, a resolution of the board was passed, signed as the former one, that the minutes of the committee, resolving that the board be recommended to do the work by their surveyor, be approved. The work was accordingly done and the expenses apportioned by the surveyor. Justices having refused, on summons, to enforce the payment of the expenses against the owners:—

Held, that none of the proceedings needed to be under the seal and hands of five of the board, as all the acts were acts of the board themselves, which did not need to be authenticated as required by s. 149; that the proceedings were therefore valid, and the justices were bound to enforce payment.

CASE stated by justices under 20 & 21 Vict. c. 43.

In June, 1853, the Public Health Act, 1848 (11 & 12 Vict. c. 63), was applied to the district of Barnsley, which is a non-corporate district within the meaning of that act; and the Local Government Act, 1858 (21 & 22 Vict. c. 98), is also in force within the district.

Under the provisions of s. 34 of the Public Health Act, 1848 (1), the following bye laws have been made by the Barnsley Local Board

(1) Section 34. "The local board of health of every non-corporate district... shall from time to time make bye laws with respect to the summoning, notice, place, management, and adjournment of its meetings, and generally with respect to the transaction and management of business by such board under this act."

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of Health, and were duly signed and sealed and confirmed by the Secretary of State for the Home Department, as required by s. 115.

"Routine of business. No. 7. The business at the ordinary or adjourned meeting of the local board shall, as far as may be convenient, be proceeded with in the following order, viz. (inter alia) No. 1. The minutes of the last ordinary or adjourned meeting, and of any extraordinary meeting that may have been held, shall be read: and in order that such minutes may be recognised as a record of the acts of the local board at their last meeting, they shall be signed by the chairman presiding at such last meeting, or, in his absence, by some member who was present at such last meeting, or in case no member who was present shall be in attendance, then by the clerk, and an entry of such minutes having been so read and signed, shall be made in the minutes of the day."

"Committees. No. 15. Every report of any committee appointed by the board shall be brought up in writing and approved, altered, or rejected, wholly or in part, or the consideration thereof adjourned wholly or in part, as the occasion may require."

The local board of health at the general annual meeting of the board, held on the 6th of May, 1862, passed the following resolution, under s. 36 (1): "Resolved, that Messrs. Ostcliffe, Pigott, Guest, Allen, Carter, and Craik, be, and they are hereby appointed, the streets and markets and sanitary committee of this board for the ensuing year."

At an ordinary monthly meeting of the board held on the 9th of December, 1862, it was "ordered that the minutes passed at a meeting of the streets and markets committee held on the 5th day of December instant, be, and the same are hereby approved by the board. The minutes are as follow (inter alia):—School Street, Pall Mall, Silver Street,—Resolved, that notices be given to level and channel, curb and ballast, these streets.

(Signed) Henry Richardson,
A member present at the meeting."

(1) s. 36. "The local board of health may from time to time appoint out of their own number so many persons as they may think fit, for any purposes which in the opinion of the board would be better regulated and managed by means of a committee: Provided that the acts of every such committee shall be submitted to the local board for their approval."

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On the 9th of February, 1863, a notice was given under s. 69 (1) to the respondent, as the owner of property abutting on parts of the streets called Silver Street and Pall Mall, reciting that the streets were not levelled &c. to the satisfaction of the local board, and giving her notice that the local board required her to level &c. within twenty one days, the parts of the streets, according to plans and specifications at the office of the board. This notice was signed by the clerk to the board.

The local board, at the general annual meeting on the 5th of May, 1863, passed the following resolution: "Resolved, that Messrs. Allen, Rogers, Carter, Ostcliffe, Pigott, and Guest, be, and they are hereby appointed, the streets and markets and sanitary committee of the board for the ensuing year."

On the 19th of January, 1864, at a meeting of the local board it was "ordered that the minutes passed at a meeting of the streets and markets committee, held on the 15th day of January, 1864, be, and the same are hereby approved by the board. The minutes are as follow (inter alia):—Silver Street, Pall Mall.—No tenders having been sent in, in reply to the advertisement for levelling, metalling, and channelling these streets, resolved that the board be recommended to do the work by their surveyor.

(Signed) Thomas Cope, Chairman."

Precisely similar proceedings were taken in the course of the year 1864 as to flagging the same streets.

(1) s. 69. "In case any present or future street, or any part thereof (not being a highway) be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by the act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

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The surveyor of the board, after the expiration of the time mentioned in the notices in that behalf, executed the works mentioned therein, and the expenses attending the execution of the works were by him apportioned in respect thereof.

On the 23rd of February, 1865, a notice was served on the respondent, requiring her to take notice that the proportion of the expenses settled and apportioned by the surveyor, payable by her, was 27*l.* 17*s.* 9*d.*, and requiring her to pay the same. This notice was signed by the clerk to the board.

At the ordinary monthly meeting of the board, on the 15th of August, 1865, it was "resolved that legal proceedings be commenced against parties in arrear with private improvement expenses, in cases where six months have nearly expired since notices of apportionment were served.

(Signed) Thomas Cope, Chairman."

None of the above resolutions, orders, notices, or other proceedings, alleged to have been taken as above, by or under the authority of the local board, were in writing under their seal and the hands of five or more of them, according to s. 149 of the Public Health Act, 1848. (1)

The respondent not having paid her proportion of the expenses pursuant to the notice, an information was laid against her (under ss. 69, 129, and 131) on the 16th of August, 1865, by the inspector of nuisances for the district, for her refusal to pay.

A summons thereon issued, and on the hearing on the 27th of September, 1865, the local board appeared by their clerk, and the respondent by her attorney; and it was objected on her behalf that the resolutions and orders, alleged to have been made by the board for the execution of the works above mentioned, or some of them, and whereby the respondent could legally be required to perform the same, and in default thereof to pay for the execution thereof by the board when afterwards performed and executed (as is alleged) by them, should be under the seal of the board and the hands of five or more of the members of the local board of

(1) s. 149. "Whenever the consent, sanction, or approval, or authority of the local board of health is required by the provisions of this act, the same shall, in the case of a non-corporate district, be in writing under their seal and the hands of five or more of them."

health; and that the above resolutions and orders, or some of them, were illegal and not binding on her for not having been so sealed and signed, and that in fact the board had made no order or given any authority in the matter by reason of having issued no order or authority in writing under their seal, and the hands of five or more of them, as required by s. 149 of the Public Health Act, 1848.

On behalf of the board it was contended that the said resolutions and orders were legal and of force under the provisions of the said act, and that the justices were bound to enforce the payment by the respondent of the sums apportioned to her.

The justices dismissed the information, and refused to enforce payment, on the ground that the alleged resolutions and orders for the execution of the said works should have been sealed and signed as contended above.

If this determination and decision were erroneous in point of law in the opinion of the Court of Queen's Bench, the dismissal was to be reversed, and the hearing of the information to be resumed.

Manisty, Q.C. (*A. Wills* with him), for the appellants. It was not necessary that these proceedings should be authenticated in the manner pointed out by s. 149 of 11 & 12 Vict. c. 63. They were taken under s. 69; and all that the local board have to do, if any particular street is not levelled &c. to their satisfaction, is to give notice to the owners of the houses abutting on the streets to do the requisite work, and then in default the board may do it themselves, and recover the expenses from the owners in a summary way. There is nothing in the statute requiring the resolutions of the board to be authenticated in any way; s. 34 enables the board to make bye laws for the conduct of their business. The bye laws are expressly required by s. 115 to be under the seal and hands of five of the board, and must be confirmed by the secretary of state, which has been done in the present case. By s. 36 the board may appoint a committee, and their acts must be approved by the board; and possibly, therefore, s. 149 would apply to the approval of any acts of the committee. But what have the committee done here? Simply in effect recommended that certain streets should be levelled and paved; and the board then pass resolutions that

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notices be sent, which is the commencement of proceedings under s. 69; and notices were accordingly sent in the name of the board, signed by their clerk, which, in order to obviate all doubt, is all the authentication expressly required by s. 61 of the Local Government Act, 1858 (21 & 22 Vict. c. 98). *Reg.* v. *Worksop Local Board of Health* (1) will be relied on by the other side; that was the case of making a rate in conformity with the surveyor's estimate, and is a very different case from the present.

M. Chambers, Q.C. (*Quain, Q.C.*, with him), for the respondent. It is a fallacy to say the committee have done no act. Section 36 is the only section under which the board have power to delegate their authority to a committee; and the committee, before resolving that notices be sent as to the paving of certain streets, must have acted in examining the state of those streets, which the board must have done had they not delegated their authority to the committee. Section 36 expressly requires that when the authority is so delegated the acts shall be approved by the board, which must mean such preliminary acts as the present: and then s. 149 says that whenever the approval is required by the provisions of the statute, it shall be in writing, under the seal and hands of five members. The resolution, therefore, approving the recommendation of the committee, which is the result of the committee's acts, ought to have been attended with these formalities. If any one of the preliminaries, resolution or notice, is insufficiently authenticated, the whole proceedings are void. *Reg.* v. *Worksop Local Board of Health* (1) is directly in point. That was the case of a rate, and the present is in effect a special rate on certain persons. The Court there say: "We think the decision of the court of quarter sessions, in holding the want of the seal of the local board to be fatal to the validity of the rate, was right. It has been urged against it, that the 149th section does not apply to acts done by the board itself, but only to acts done (that is, as is contended, done by others) with the consent of the board, its sanction, approval, or authority. But the section provides that, whenever the approval of the board is required by the provisions

(1) 34 L. J. (M.C.) 220; 5 B. & S. 951.

of the act, such approval shall be in writing under its seal, and under the hands of five members of it." Now, in the present case, by s. 36, whatever the committee do, requires the approval of the board.

[COCKBURN, C.J. The difficulty I feel is in ascertaining what has really been done; whether the committee took upon themselves to act, or merely recommended a certain course of action to the board. If what has been done is the act of the committee, it requires the approval of the board within the decision of *Reg.* v. *Worksop Local Board of Health.* (1) If on the other hand the resolution of the board is a substantive resolution and act of the board, then it requires no approval, and is not within s. 149.]

Manisty, Q.C., in reply. It is clear that the committee have not done more than recommend. The committee have done no act; in fact, no act which is material to the present proceedings is done until the notice was given, which is the first step required under s. 69. The committee point out that certain streets are insufficiently paved, on which the board commence action by themselves sending the notice.

COCKBURN, C.J. I am of opinion that the decision of the magistrates was wrong. If the act had required a resolution of the board that the street should be paved before they would be empowered to give notice to the owners or occupiers of houses abutting on the street, and the board had delegated its powers to the committee, which they could only do under s. 36, subject to the acts of the committee being afterwards approved by the board, and thereupon the committee had taken upon themselves to determine that the street should be paved, then Mr. Chambers' argument might be well founded. But when we come to look at s. 69, which authorizes the board to give notices to the adjoining owners, we find no reference to any antecedent proceedings; the section simply requires that a notice in writing shall be given, and then certain consequences shall ensue. Now, in the present case the board have given a notice, which is sufficient to give jurisdiction for the further proceedings. It is true that the notices were

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given by the clerk in the name of the board; but it is plain that the board themselves were acting through their clerk, and the committee did not take upon themselves to act, but only recommended that the streets should be paved. There was, therefore, no act which required the approval of the board. There was simply a recommendation of the committee, which the board adopt and act upon by making the recommendation a substantive resolution of their own. Section 149 makes the seal of the board necessary, whenever the sanction or approval of the board is required by the provisions of the statute; this is the act of the board themselves, and there is no provision requiring that the act of the board themselves shall be authenticated by their seal. Consequently all that was done here being by the board themselves, commencing with the notice, all the proceedings subsequent to it were right, and the justices ought to proceed and adjudicate on the complaint.

BLACKBURN, J. I am entirely of the same opinion. The local board have themselves done all that s. 69 requires. If the local board are not satisfied with the paving &c. of any street, the local board are to give notice to the owners or occupiers of adjoining houses to do the necessary work; and if the notice be not complied with, the local board may themselves do the work, and the expenses, having been apportioned by the surveyor, may be recovered in a summary manner; viz. under s. 129, by information and summons before two justices. By s. 36 the board may appoint a committee for any purposes which the board may think would be better managed by a committee, provided the acts of the committee shall be submitted to the board for their approval. It is not necessary to say, if the streets committee were to take upon themselves to do the acts mentioned in s. 69, whether they could lawfully do them subject to the approval of the board: and, if they could, then possibly such approval would require to be authenticated by the seal and signatures of five of the board. In the present case the resolution appointing the committee simply appoints six persons to be the streets committee; not to do any particular acts; and the committee accordingly do not do any acts: what they do is not to send notices, but simply to resolve that notices should be given; and the minutes of the committee to that effect are brought before

the board at their next meeting. And whether the board approve or reject the resolutions of the committee, the legal effect is that, the committee having expressed an opinion, the board reject or adopt it, and so act on it; the board in effect pass resolutions to send notices, and the notices are accordingly sent in the name of the board; and it is quite sufficient to say that the board are acting themselves and not sanctioning the acts of others. It is said that their direction to the clerk to send notices ought to have been evidenced by their seal and the hands of five; but if we look at s. 149, it is not so worded, nor intended to apply to such a case. By the judgment in *Reg.* v. *Worksop Local Board of Health* (1) it was not intended to say that every act done by the authority of the board must be authorized under seal, but only such acts as the statute expressly requires to be approved by the board. In the present case it seems clear to me that the board might well send out notices under s. 69, and so found the jurisdiction to proceed for the expenses by summary process, without the signature of five and the seal of the board being attached to the notice.

LUSH, J. I am of the same opinion. The question is, whether the acts done, viz. the giving notices to the owners to do the work, and the subsequent resolution authorizing the surveyor to do the work and apportion the expenses, were acts of the board or of the committee; if they were the acts of the committee they would require the approval of the board, which, by s. 149, must be under the seal and hands of five of the board. Now all that was actually done, was done by the board and not by the committee. There is nothing in the statute requiring the resolutions of the board to be authenticated in any particular way; and the resolution appointing the committee does not delegate to them the power of doing any acts, but is simply to suggest what ought to be done; and the bye law shews this: "every *report* of any committee shall be brought up in writing, and approved, altered, or rejected, wholly or in part, or the consideration adjourned, wholly or in part, as the occasion may require." The committee, therefore, are appointed not to act, but to report. And that is exactly what they did in the present case; and the minutes of the committee were not in-

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tended to be acted upon until approved by the board; they then become the resolution of the board, and, in pursuance of the resolution of the board, notice is given by the board through their clerk. The acts were, therefore, the acts of the board, and were not the less so because they were proposed and recommended by the committee.

Case remitted accordingly.

Attorney for appellants: *H. H. Poole, for W. H. Peacock, Barnsley.*
Attorney for respondent: *W. M. Wilkinson, for B. Marshall, Barnsley.*

Jan. 25.

CROFTS *v.* HALDANE AND ANOTHER.

Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *ss.* 83, 85—*Obstruction to Light.*

The Metropolitan Building Act, 1855, s. 83, par. 6, which gives "a right to the building owner to raise any party structure permitted by this act to be raised, upon condition of making good all damage occasioned thereby to the adjoining premises," does not authorize the raising of a structure so as to obstruct ancient lights in the adjoining premises.

DECLARATION, that the plaintiff was possessed of a messuage and premises known as No. 28, Old Bond Street, in the county of Middlesex, and was entitled to have the light and air enter therein through certain lights or windows in the said messuage and premises, and the defendants prevented and obstructed the light and air from entering through the lights or windows into the messuage of the plaintiff by wrongfully and injuriously erecting a certain wall and building near to the lights or windows, and continuing the same so erected, whereby the said messuage and premises of the plaintiff have been and are rendered dark, &c., and the plaintiff is prevented from using his premises so advantageously as he otherwise could and would have done, as a gallery for exhibiting for sale pictures and paintings, and water-colour drawings and other works of art; claiming 2000*l.*, and a writ of injunction to restrain the continuance and repetition of the injuries and grievances complained of.

Fifth plea, that the wall and building in the declaration

mentioned is a party structure in the metropolis, erected by the defendants in pursuance of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), in the place and stead of a certain other party structure which the defendants were permitted by the act to pull down, rebuild, and raise, and which they pulled down, rebuilt, and raised accordingly, and in pursuance of the act; and the messuage and premises of the plaintiff in the declaration mentioned were separated from premises of the defendants by, and were adjoining to, the party structure so pulled down, rebuilt, and raised; and the defendants then were the building owners of the party structure, and the plaintiff was the adjoining owner within the meaning of the act; and before the defendants began so to pull down, rebuild, and raise the said structure all notices and all information were given, and all conditions were performed, and all things happened and existed, and all times elapsed necessary to entitle the defendants so to pull down, rebuild, and raise the party structure subject to the provisions of the act, the structure so built and raised being the wall and building in the declaration mentioned, and to continue the same so erected as in the declaration mentioned subject as aforesaid, and to authorize and entitle the defendants and plaintiff to make the appointment of surveyors as hereinafter mentioned; and before the pulling down, rebuilding, or raising the party structure the defendants caused the plaintiff to be fully informed of the form, height, and description in all respects of the structure intended to be rebuilt and raised in the place and stead of that which was so intended to be pulled down, whereupon, and by reason thereof, differences arose within the meaning of the act, respecting the matters aforesaid between the defendants as such building owners, and the plaintiff as such adjoining owner, including a dispute and difference between them as to the intended structure preventing and obstructing the light and air from entering through the lights and windows in a manner similar to that complained of in the declaration, and the damages to be occasioned thereby to the premises of the plaintiff adjoining to the party structure as aforesaid; whereupon and before pulling down, rebuilding, or raising the said party structure, the defendants and the plaintiff, by virtue and in pursuance of the act, each appointed a surveyor, the two surveyors selected and appointed a

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third surveyor, for the settling of all disputes and differences arising out of or incidental to the pulling down, rebuilding, and raising the party structure, including the dispute respecting light and air with all such powers as in and by the act is provided, and the three surveyors made and published their award in writing respecting the matter so referred to them. The plea then set out the award (which gave minute directions how the wall &c. was to be built), and alleged that the wall &c. had been built in conformity with the award, and part of the erection was the wall and building complained of by the plaintiff.

The sixth plea was in the same terms as the fifth, but instead of setting out the award, alleged that the surveyors took upon themselves the office, and proceeded, in the exercise and part performance of their duties as such surveyors pursuant to the act, to settle divers of such disputes and differences between the plaintiff as such adjoining owner, and the defendants as such building owners, arising out of and incidental to the said pulling down, rebuilding, and raising the party structure, but the dispute and difference respecting light and air and damage still remains unsettled and undecided, and yet to be settled and decided by the surveyors; and all the powers and authority given to and vested in them by the act for settling the dispute and differences respecting light and air, and damage, and all other disputes and differences arising out of, or incidental to, the pulling down, rebuilding, and raising the said party structure still remain so vested in them, unexpired, unrevoked, and undetermined, and the causes of action in the declaration mentioned are such disputes and differences arising out of, and incidental to, the said pulling down, rebuilding, and raising the party structure as aforesaid.

Demurrers to both pleas, and joinder in demurrer.

Jan. 22. *Hannen* (*Philbrick* with him), in support of the demurrers. The defendants rely on the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122); but there is nothing in that act authorizing the owners of property in the metropolis so to raise any building, be it a "party structure," or otherwise, as to interfere with the right to light acquired by an adjoining owner. The act was passed altogether alio intuitu: simply to regulate the mode

of building, without any reference to easements or other rights. *Titterton* v. *Conyers* (1) and *Wells* v. *Ody* (2), decided on the similar act, 14 Geo. 3, c. 78, shew that the power to pull down and build up, and even to raise party walls, &c., is irrespective of other collateral rights, which remain as at common law, and cannot be taken away except by express words or irresistible implication.

Jan. 25. *G. Rochfort Clarke*, contrà. The cases cited were under a very different statute from the present. There is a general right given in 18 & 19 Vict. c. 122, part iii. s. 83, par. 6 (3), to raise any party structure, making good, that is, paying for all damage caused thereby; and there is no exception as to easements, such as access to light and air. The plaintiff's remedy, therefore, was by arbitration of surveyors under s. 85 par. 7, a course which has been adopted: subject to appeal, had the plaintiff chosen, to the county court. Both the pleas, therefore, are good; and raise a defence to the action.

Hannen was not heard in reply.

COCKBURN, C.J. The case seems to me quite clear. It turns

(1) 5 Taunt. 465.

(2) 1 M. & W. 452.

(3) 18 & 19 Vict. c. 122, part iii. s. 83. "The building owner shall have the following rights in relation to party structures: (6) a right to raise any party structure permitted by the act to be raised, or any external wall built against such party structure, upon condition of making good all damage occasioned thereby to the adjoining premises, or to the internal fittings and decorations thereof; and of carrying up to the requisite height all flues and chimney-stacks belonging to the adjoining owner, or against such party structure or external wall."

s. 85. "The following rules shall be observed with respect to the exercise by building owners and adjoining owners of their respective rights. (7) In all cases not specially provided for, where a difference arises between a building owner and adjoining owner, in respect of any matter arising under this act, unless both parties concur in the appointment of one surveyor, they shall each appoint a surveyor; and the two surveyors so appointed shall select a third surveyor, and such one surveyor, or three surveyors, or any two of them, shall settle any matter in dispute between such building and adjoining owner, with power by his or their award to determine the right to do, and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference." (8) Makes the award conclusive, unless there is an appeal to the county court within fourteen days of the delivery of the award; and the county court may rescind or modify the award.

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entirely on the construction of paragraph 6 of s. 83, which enacts that, amongst other rights in relation to party structures, the building owner shall have a right to raise any party structure permitted by the act to be raised, upon condition of making good all damage occasioned thereby to the adjoining premises, or to the internal finishings and decorations thereof. Under that enactment, Mr. Clarke contends that the building owner has a right to raise an external wall, although he interferes with the ancient lights in the neighbouring premises. In terms, there is certainly no such provision; and we ought not to imply it unless there are some terms from which such an inference might reasonably be drawn. But so far from there being any ground to imply this right, it appears to me that the language used leads directly to the opposite conclusion; when the statute gives the right to raise any party structure "on condition of making good all damage to the neighbouring premises and the internal finishings," it clearly means that the building owner must restore the neighbouring premises to their condition previous to the erection; and cannot be forced into meaning, not only that he is to restore or make good any structural damage, but to give pecuniary compensation for destroying access to light. *Wells* v. *Ody* (1) is a strong authority to shew that in such a case as the present, unless express power be given to interfere with the right to light, it ought not to be inferred. The enactment has reference to structural damage, and not to paying damage for the invasion of a right. The second ground put forward, that the plaintiff's remedy was not by action, but by the arbitration of a surveyor, subject to appeal to the county court, under paragraphs 7 and 8 of s. 85, also depends entirely on paragragh 6 of s. 83: because if the building owner has no right to raise a party wall so as to interfere with the right to light, there is no matter arising under the act for the surveyor's arbitration. Both branches, therefore, of the argument on behalf of the defendants fail, the second depending on the first; and there must be judgment for the plaintiff.

BLACKBURN, J. I am of the same opinion. When a right to free access of light has been acquired, the owner of the adjoining

(1) 1 M. & W. 452.

land cannot at common law raise buildings on his own land so as to obstruct the light. But the argument has been that, by force of the Building Act, this can be done in the metropolis, provided the work be done to the satisfaction of a surveyor, subject to appeal to the county court. No doubt the legislature might, if it thought proper, confer such a power, but we should pause before saying that it had done so, except by express words; and it is sufficient answer to say, that Mr. Clarke has failed to shew any express words in the act or any clause implying an intention to allow interference with ancient lights in a manner which it is agreed could not be done at common law. There is a series of enactments in part iii. of the act which do, for obviously good reasons, enable the building owner to deal with party structures in a way in which he would have no right at common law: but there is not one word in them to indicate an intention that he shall be at liberty to raise a wall so as to interfere with a neighbour's right to light any more than there is to take his land. Such a right as that claimed by the defendants would require very clear words to confer it, and they are nowhere to be found.

LUSH, J. The argument of Mr. Clarke is founded on an entire misconception of the objects of the Building Act. There was no intention to interfere with rights such as easements of adjoining proprietors; the act was simply to regulate the construction of buildings, and to prescribe the mode in which adjoining owners might proceed when dealing with party structures. Paragraph 6 of s. 83, which Mr. Clarke relied on so much, and which says that the building owner shall have the right to raise a party structure permitted by the act to be raised, has reference to the schedule, which contains rules as to the length, thickness, and height of party walls, and the paragraph in effect says, you may raise a party structure within the limits given in the schedule, making good all damage to the adjoining premises; but it only gives power to raise a wall with reference to the other parts of the act, and not generally so as to give a right to interfere with an easement. *Wells* v. *Ody* (1) is completely in point, as it was decided on a statute in pari materiâ with the present; but without that

(1) 1 M. & W. 452.

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authority the meaning of the statute is too plain to admit of any doubt.

Judgment for the plaintiff.

Attorneys for plaintiff: *Vallance & Vallance.*
Attorneys for defendants: *Davis, Son, Campbell, & Reeves.*

Jan. 22.

HOOPER AND ANOTHER *v.* CLARK.

Covenant running with reversion—Covenant to leave Land at end of term well stocked with Game—Incorporeal Hereditament—32 Hen. 8, *c.* 34.

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C. granted and demised the exclusive right and licence to take and kill game on certain land, with the use of a cottage, to the defendant for a term; and the defendant covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise. C. assigned his reversion in the land and hereditaments to the plaintiffs; and they brought an action, at the end of the term, against the defendant for a breach of his covenant:—

Held, that the demise was not a mere licence, but the grant of an incorporeal hereditament; that the covenant touched the hereditament demised, and by virtue of 32 Hen. 8, c. 34, the assignees of the reversion could sue upon it.

DECLARATION that one Campbell being seised of the lands and hereditaments thereinafter mentioned to have been granted and demised to the defendant, for the term of his life, by deed granted and demised to the defendant, the exclusive right and licence to shoot, kill, and take the game upon and from certain lands and estates, together with the use of a cottage on the lands for the occupation of a keeper, for the term of seven years, from the 31st of January, 1859, at the yearly rent of 130*l.* That the defendant covenanted (amongst other things) that he would at the end of the term, leave the estate as well stocked with game in all respects as the same then was: that defendant entered upon and enjoyed the lands, hereditaments, and privileges in the grant and demise for the term (which has ended): that Campbell afterwards and during the defendant's term, by deed granted and assigned his reversion of and in the said lands and hereditaments to the plaintiffs, to hold to them for one hundred years, if Campbell should so long live. Averment of conditions precedent. Breach,

that the defendant did not at the end of the term leave the estate as well stocked with game in all respects as the same was at the time of making the grant and demise.

Demurrer and joinder.

H. S. Giffard, Q.C., in support of the demurrer. There are two points: First, that the demise is not one to which a reversion is incident; secondly, a covenant to leave land as well stocked with game as at the time of the demise is not a covenant which runs with the land. On the first point, it is clear on the construction of the whole instrument there is no demise of the land; all that the lessee is entitled to is the use of the cottage, and the action is not brought for anything done to the cottage. The lease contains a mere licence to shoot game. Secondly, the covenant is only a personal covenant which does not touch or affect the land; and is, therefore, not within 32 Hen. 8, c. 34. The case falls within the third resolution in *Spencer's Case* (1): "If a man leases sheep, or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion:" *Wood and Foster's Case.* (2)

[BLACKBURN, J. That was a covenant to keep sheep; there would be a closer analogy if it had been to keep the sheep upon the land.]

Such a covenant might run with the land, because the land would be benefitted by being manured, but here the land is neither the better nor worse for having game upon it.

[LUSH, J. It is beneficial to the estate as touching its value and its enjoyment.]

It does not impart to the land any quality which it had not before; it is simply a covenant to rear other game on the land instead of those destroyed: it is to do something collateral to the land.

(1) 5 Rep. 15 b; 1 Sm. L. C. 43, 5th ed. (2) 1 Leon. 42.

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[LUSH, J. A covenant to reside on the demised premises has been held to run with the land: *Tatem* v. *Chaplin* (1): the land would not be benefitted because a man resided on it.]

Hayes, Serjt., contrà. The lease contains the grant of an incorporeal hereditament: *Wickham* v. *Hawker* (2); and it has been decided in *Blades* v. *Higgs* (3), that the owner of land has a right of property in game as long as it is on the land. The other point is concluded by *Martyn* v. *Williams* (4); it was there held that a covenant will run with an incorporeal hereditament in the same way as it would run with the land. That case follows the older authorities of *Bally* v. *Wells* (5) and *Earl of Egremont* v. *Keene* (6), which are cited in the judgment of the Court.

Giffard, Q.C., replied.

COCKBURN, C.J. I think the covenant is one running with the land. There is a demise of an incorporeal hereditament, and one of the conditions attached to the lease is, that, at its expiration, the lessee shall leave the land as well stocked with game as it was when he entered. It is a covenant which affects the value of the estate, and is valuable to the owner only on that ground; it affects the enjoyment of the estate; and it relates to a matter to be done on the land, and touches and concerns the thing demised; the advantage of the covenant therefore clearly passes to the assignees of the reversion.

BLACKBURN, J. I am of the same opinion. The right granted to the defendant is to shoot, kill, and take game, which is a creation of an incorporeal hereditament; and in the deed creating the incorporeal hereditament the grantee has covenanted that he would, "at the end of the term, leave the estate as well stocked with game as the same was when he entered upon the enjoyment of the estate." The question is, can the assignee of the estate sue for a breach of that covenant in his own name, or must he bring the action in the name of the assignor as his trustee? The first question is, this being the demise of an incorporeal heredi-

(1) 2 H. Bl. 133.
(2) 7 M. & W. 63.
(3) 34 L. J. (C.P.) 286; 11 H. L. C. 621; 20 C. B. (N.S.) 214.
(4) 1 H. & N. 817; 26 L. J. (Ex.) 117.
(5) 3 Wils. 25.
(6) 2 Jones' Ex. Rep. (Ireland) 307.

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tament, do covenants which would run with a demise of land, run with it? *Martyn* v. *Williams* (1) decides that they do. Then it is said that it is not every covenant contained in a lease which runs with the land, but only those which touch or concern the land; no covenant more closely touches and concerns land than a covenant to keep on the land a certain quantity of game; in order to keep up the game some one must be constantly on the land; and the observance of the covenant can be a benefit to no one but the owner of the land; it is more intimately connected with the land than a covenant to reside, which has been held to run with the land.

LUSH, J., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Robson & Tidy.*
Attorneys for defendant: *Wilkinson, Stevens, & Co.*

WILSON AND ANOTHER *v.* THE BANK OF VICTORIA.

Feb. 12.

Ship—General Average—Sailing Ship with Auxiliary Steam Screw—Substitution—Cost of extra Coals.

A clipper sailing ship of 2000 tons, with an auxiliary steam screw of 130 horse power, and carrying about 550 tons of coal, sailed on a voyage from Australia to England. After eleven days she came in collision with an iceberg, and suffered so much damage in her masts and upper works on one side, as practically to have lost all power of sailing. She reached Rio de Janeiro under steam alone, having nearly exhausted her stock of coals. The repairs necessary to restore her sailing powers would have cost at Rio many thousand pounds more than in England, and would have occupied several months, and the cargo would have had to be unshipped and warehoused. The captain, therefore, had only temporary repairs done (which took three days) sufficient to enable him to complete his voyage under steam alone; and in order to do this he had to purchase coals at Rio, and again at Fayal. The voyage having been accomplished under steam alone, the shipowners sought to charge the cost of the coals against shippers of cargo as general average: either on the principle that the expenditure was a substitution, beneficial to all parties, for a greater expenditure, which the captain had a right to incur by repairing at Rio, and ought to be apportioned in the same

(1) 1 H. & N. 817; 26 L. J. (Ex.) 117.

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way as the greater expenditure would have been; or, as an extraordinary expenditure for the general advantage of all interests concerned:—

Held, assuming the repairing at Rio would have been justifiable, and any of the incidental expenses chargeable against the shippers as general average, that there was no legal principle on which expenses incurred by one course could be apportioned according to what might have been the facts if a different course had been adopted.

Secondly, that the shipowners, by the contract of affreightment on such a ship, were bound to give the services of the auxiliary screw and to make all the necessary disbursements for fuel: and although the circumstances caused these disbursements to be extraordinarily heavy, they did not render them an extraordinary expenditure within the rule as to general average.

DECLARATION, by which the plaintiffs sought to recover, as owners of the ship *Royal Standard*, against the defendants as owners and consignees of gold shipped on board, 189*l*., as their contribution to general average.

Plea. Payment of 85*l*. into court.

Replication, damages ultra.

Issue thereon.

At the trial before Mellor, J., at the spring assizes, 1866, at Liverpool, the facts stated in the judgment of the Court were proved, and the plaintiffs had a verdict for the balance of their claim, leave being reserved to move to enter a verdict for the defendants, if the Court should be of opinion that the expense incurred for the coal was not the subject of general average; the Court to be at liberty to draw inferences of fact.

A rule having been obtained accordingly,

Jan. 29. *Milward, Q.C.*, and *Baylis*, shewed cause. The expense of the extra coals was general average, to be contributed in the same proportion as the expenses incident to the repairing the vessel at Rio would have been apportioned, if the master had repaired there, instead of adopting the best course for all parties by doing small temporary repairs and coming home under steam alone. After the collision the ship was compelled to make for Rio as the best port of refuge for repairs; and the master had a right to repair there, being unable to prosecute his voyage under the ordinary power of sailing; and if he had done this the cargo must have been unshipped and warehoused; and he was entitled to stay and charge the costs of delay, unshipping, and warehousing, to the

owners of cargo in the usual manner; and the apportionment in the present case has been made on this basis.

[LUSH, J. The question is, what is the contract of affreightment on such a ship as the present.]

The bills of lading were not in evidence; it must be taken, therefore, that they were in the ordinary form. Taking them to have been in the ordinary form, the master was not bound to prosecute the voyage except with the ordinary appliances of a clipper sailing vessel, the steam screw being only auxiliary, or to assist the ordinary motive power. He clearly was not bound to proceed to sea under steam alone. The small quantity of coals the vessel could carry shews that the contract or understanding of the parties was that sailing was to be the ordinary motive power. As the captain therefore had the right to do the repairs at Rio necessary to restore the ship's sailing powers, and charge general average accordingly, the course he adopted was a proper substitution for the advantage of all parties, and the cost of this substitution must be paid in the same proportion by all parties benefitted.

[BLACKBURN, J. This principle of substitution is quite novel.]

The average staters gave some instances in which it had been applied and the general average paid.

[BLACKBURN, J. Two or three instances in which the claim has been submitted to prove nothing.]

In *Taylor* v. *Curtis* (1), Gibbs, C.J., puts usage as one of the modes of deciding what is general average.

[BLACKBURN, J. No doubt; and had a general custom been shewn it might be another matter. But even assuming the principle, here the captain had the means in his power of getting home at once under steam, had he the right to wait and incur all the expense?]

Without having recourse to the principle of substitution, the plaintiffs can recover this expenditure as general average. In *Birkley* v. *Presgrave* (2), Lawrence, J., thus defines general average: "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, come within general average, and must be borne proportionably by all who are interested." The cost of the extra coals here was an extra-

(1) 2 Marsh. at p. 318. (2) 1 East, at p. 228.

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ordinary expenditure necessary to bring the ship safely home, and was general average, just as the cost of extra hands to work the pumps, which was held general average in *Birkley* v. *Presgrave*. (1) And there are other similar instances to be found in the cases collected in the notes to *Birkley* v. *Presgrave*. (2) In Arnould on Insurance, vol. ii. p. 770. 3rd ed., the two classes of losses which give a claim to general average are thus defined: 1. Those which arise from sacrifices of part of the ship or part of the cargo purposely made in order to save the whole adventure from perishing. 2. Those which arise out of extraordinary expenses incurred for the joint benefit of both ship and cargo. And at p. 782 the author gives an instance of the first class, under the head "Conversion to a different purpose." "If any part of the ship or her tackle be applied for the common benefit to some purpose different from its ordinary use, the loss thence arising is a general average loss; as if spars are cut up to construct a rudder, or sails and cordage used to stop a leak;" and he also puts the instance of an anchor cable being cut and used to fasten a ship to a pier. So here the screw was only intended to be used to assist the sailing power, and being made the sole motive power, it was converted to a different purpose.

[LUSH, J. Suppose the ship had been dismasted in mid ocean, or had been becalmed for an extraordinary time, in both cases the master would have been bound to use more coals than ordinarily.]

Those are instances precisely within the contract. But here the case could not be in the contemplation of the parties, as double the quantity of coals which the vessel could carry, were consumed on the voyage. In Arnould, p. 788, in considering the second class, viz. that of extraordinary expenditure, it is said: "There are two main questions which determine whether any given expenditure ought to found a claim to contribution in general average. 1. Was it of an extraordinary nature? In other words, was it anything more than one of those ordinary disbursements of the voyage which are necessary for keeping the ship in a proper condition to transport the cargo, and which the owner of the goods has therefore a right to demand of the owner of the ship, without being called on to contribute towards their payment?

(1) 1 East, 220. (2) Tudor's L. C. on Mercantile Law, 74.

2. Even supposing the expenditure to have been of an extraordinary nature, was it also incurred for the joint benefit of both ship and cargo? If the answer to both these questions be in the affirmative, the expenditure ought, on principle, to be made good to the party who has incurred it, by those who have benefitted by it; in other words, should be regarded as a general average loss . . . . From these principles, it follows, that where a ship has either cut away her masts or rigging, or has been so damaged by a storm, that it is necessary, for the safety both of ship and cargo, to put into a port of distress for repairs, all the expenses inseparably connected with the act of first putting into, and afterwards clearing out of such a port of distress, give the shipowner a claim to a general average contribution; and this upon the plain ground that these expenses are a necessary consequence of an extraordinary measure, taken for the general preservation. This includes port dues and charges, and sums paid in remuneration of services rendered in bringing the ship into port and clearing her out again, pilotage, towage of a disabled ship into a port of distress, charges of taking off anchors and cables, and rendering assistance generally, wages of people engaged to guard property during the repairs." This shews what the captain might have done; and therefore, either on the principle of substitution, or as an extraordinary expenditure, the plaintiffs are entitled to this claim as general average.

E. James, Q.C., and *Mellish, Q.C.*, in support of the rule. The plaintiffs' case at the trial was rested entirely on the principle of substitution; that the cost of working the auxiliary screw was in lieu of that of the workmen, &c., in removing the cargo and warehousing it; which would have been incurred, had the other course been adopted. To this, the answer is, that no such principle is known to the English law; possibly, if such a custom were proved to exist in any particular port, it might be binding, under particular circumstances; but no such custom was even attempted to be proved here. Moreover, the repairing for which the expenditure for coals is said to have been substituted, would not have been justifiable itself, nor the expenses incident to it the subject of general average. And this, in effect, involves pretty much the same ground

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as the plaintiffs' second point, that the cost of the coals was an extraordinary expenditure within the rule as to general average. The extension of general average to an extraordinary expenditure is itself an innovation on the original rule, adopted from the Rhodian law, that a voluntary sacrifice for the common benefit, was to be contributed for proportionably by all the interests benefitted. What is the contract here? The fact of the vessel having an auxiliary screw can make no difference in the contract, which must be taken to be the ordinary one between shipper and shipowner, viz. the shipper engages to pay freight for having his goods conveyed from the port of loading to the port of discharge in that particular ship, which is a sailing vessel with an auxiliary screw; and no doubt the freight was higher than in an ordinary sailing vessel, because the owner holds out this compound power of propulsion. On the other hand, the shipowner contracts to use both or either power, according to the exigencies of the voyage. It is true that the vessel cannot carry more than 600 tons of coal, but the shipper is not affected by that; the shipowner must put into port for more, if it is necessary. There can be no distinction between the ordinary and the extra coal.

[BLACKBURN, J. The argument for the plaintiffs was, as in *Birkley* v. *Presgrave* (1) the cost of the extra men to work the pumps on the voyage home was general average, though the extra work of the ordinary crew was not, so the cost of extra coal was general average, though that of the original stock of coal was not.

LUSH, J. In *Birkley* v. *Presgrave* (1) the extra cost was incurred to avert an imminent peril.]

That is the distinction. This cost of the extra coals is a necessary and usual disbursement for the prosecution of the voyage, extraordinary in amount owing to the peculiar circumstances of the voyage, but not an extraordinary expenditure. It is not distinguishable from the cost of extra provisions rendered necessary by an unusually lengthened voyage, or extra wages of the crew, which are clearly not general average by the English law. In *Hallett* v. *Wigram* (2), Wilde, C.J., points out that the doctrine as to general average, where a ship is compelled to put into port for

(1) 1 East, 220.

(2) 9 C. B. at pp. 601—3; 19 L. J. (C.P.) at pp. 288—9.

repairs, has been stated too widely on the authority of *Plummer* v. *Wildman* (1), which, however, had been explained away by Lord Ellenborough himself, in the subsequent case of *Power* v. *Whitmore* (2), on the ground that the master had been compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he had sacrificed. And the Chief Justice then cites the following passage from Abbott on Shipping, p. 497, 8th ed., as summing up the result of the cases: "It seems to result from these decisions, that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages, and provisions during the stay, are to be considered as general average; but if the damage was incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner, to keep his vessel tight, staunch, and strong, during the voyage for which she is hired." And Cresswell, J., expresses himself to the same effect as the Chief Justice. The present case therefore, in neither view, can be brought within general average. Here there was no sacrifice and no common benefit. In the one view, the means adopted were simply the best for saving the shipowner from enormous expenses; in the other, simply an excess of a disbursement, which *must* be made by the shipowner in prosecution of the voyage, over what is contemplated in an ordinary voyage.

Cur. adv. vult.

Feb. 12. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.,) was delivered by

BLACKBURN, J. This was an action to recover from the defendants the contribution to general average due from them as owners of a large quantity of gold, part of the cargo of the plaintiffs' ship, *Royal Standard,* on her voyage from Melbourne to England. The defendants paid money into court sufficient to cover the plaintiffs' claim, with the exception of one item; and the question for the

(1) 3 M. & S. 482. (2) 4 M. & S. 141; 149.

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Court is, whether that item was such as to be properly included in the general average.

The facts, as far as material to the present question, appeared at the trial to be as follows:—

The *Royal Standard* was a large sailing vessel, furnished also with steam power and a screw. The screw was capable of being shipped on board when the vessel was sailing; and the quantity of coal which the vessel was capable of carrying was very inadequate for a steam voyage from Australia to England (1), so that it was obviously contemplated that the voyage was to be principally performed by means of the sailing power of the ship, the steam power being only to be used as auxiliary, which is, indeed, the common phrase in use to describe such vessels,—a clipper ship with auxiliary steam screw.

She sailed from Melbourne with the defendants' gold and other cargo, and on the voyage came into collision with an iceberg. The effect of this disaster was to dismast her, and to injure her upper works on the starboard side, so that she could not, when on the port tack, bear any sail, and when on the starboard tack, had not the means of making any quantity of sail: so that her sailing power might practically be said to be destroyed. By means, however, of her screw and her steam power she reached the port of Rio de Janeiro in this state. (2)

It appeared that in order to repair the sea damage, so as to restore the sailing power of the vessel, it would have been necessary to land the cargo and warehouse it, and to detain the vessel at Rio for many months, and that the expenses of the repairs there would have been very heavy, so much so that it seems probable they would have exceeded the value of the ship when repaired; at all events, they would have cost many thousands of pounds more than if done in England. But it appeared that by making some slight temporary repairs, which would not require that the cargo should be unloaded, and which in fact only caused a detention of three

(1) The ship was of 2000 tons, with 130 horse steam power, and could carry from 550 to 600 tons of coal.

(2) She left Melbourne on the 24th of March, 1864, encountered the iceberg on the 4th of April, and reached Rio on the 9th of May, whence she steamed on the 12th of May, and reached Liverpool on the 12th of June.

days, the vessel might be made fit to come home under steam. The master resolved to adopt this latter course; and there can be no doubt that in so doing he acted properly. In order to bring her home under steam it was necessary to purchase coal, first at Rio, and afterwards at Fayal. (1) The value of the coal purchased and consumed in bringing her home was between 1400*l.* and 1500*l.*, and the question that arises is, whether the whole or any part of that sum can properly be charged to general average, all the other items claimed by the plaintiff being covered by the money paid into court.

When a vessel at a port of refuge requires repairs to prosecute her voyage, and for that purpose the cargo is unloaded, warehoused, and re-shipped, the practice is to charge part of these expenses to the ship, part to the goods, part to the freight, part to general average, and part to the owners. Two average adjusters of great experience proved that, if the repairs had in fact been so done at Rio, a large proportion of the expenses would have been such as, according to the practice, would have been charged to general average; and they made out the adjustment, and the plaintiff claimed on the following principle: They said the money expended in buying coal was an expenditure to prevent the necessity of unshipping the cargo at Rio, and therefore ought to be charged against the same interests, and in the same proportions, as the expenditure which it prevented would have been charged. (2)

We wish to guard against being supposed to sanction the notion that, in a case like this, the shipowners could have charged the owners of the cargo with any part of the expenses of unshipping and warehousing the gold at Rio, supposing the master had, under the circumstances, adopted that course. Inasmuch as the master could, by the expenditure of a comparatively small sum on temporary repairs and coals, bring the ship and cargo safely home, it

(1) The 550 tons of coal on board when the ship sailed from Melbourne were nearly exhausted by steaming to Rio; 400 tons were shipped there, and 100 at Fayal; the cost of the 500 tons being 1472*l.*

(2) The adjustment, so far as it related to the 1472*l.* for the coals, was:

General average, pays	£500
Cargo	135
Freight	85
Ship	650
Owners (not underwriters)	102
	£1472

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was his duty to do so; and though we do not decide a point which does not arise, we are not to be taken as deciding that his owners would not have been liable to the owners of the cargo if he had not taken this course. But passing this by, we think that the expenses actually incurred must be apportioned according to the facts that actually happened, and that there is no legal principle on which they can be apportioned according to what might have been the facts if a different course had been pursued.

No case or authority was cited to support the principle contended for, nor are we aware of any. If in any particular trade it has been found convenient to act on this principle, and that has been done to such an extent as to create a custom, tacitly making it part of the contract that this shall be the principle applied, or if the parties to a charterparty stipulate that it shall be so, and by words of reference to the charterparty in the bills of lading and the policies of insurance, make it part of the contract affecting every one, the case would be different; but as it is, the principle proposed is not, we think, tenable at law.

The counsel for the plaintiffs then argued that, at all events, the money paid for the coals was an extraordinary expenditure, and as such to be contributed for as general average; but we think this is not so.

The shipowners, by their contract with the freighters, are bound to give the services of their crew and their ship, and to make all disbursements necessary for this purpose. In the case of such a vessel as this, which is equipped with an auxiliary screw, their contract (1) includes the use of that screw, and consequently the disbursements necessary for fuel for the steam engine. Now, the disaster which occurred in this case, no doubt, caused the engine to be used to a much greater extent than would generally occur on such a voyage, and so caused the disbursement for coals to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing vessel, in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions, and for the wages of his crew, if they are paid by the month, are

(1) The bills of lading under which the defendants' gold was shipped were not in evidence.

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extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature.

We think, therefore, that there is no right to charge this item to general average, and consequently that the rule to enter the verdict for the defendants must be made absolute.

Rule absolute.

Attorneys for plaintiffs: *Gregory, Rowcliffes, & Rawle, for Hull, Stone, & Fletcher, Liverpool.*

Attorneys for defendants: *Waltons & Bubb.*

TAYLOR, APPELLANT; THE METROPOLITAN BOARD OF WORKS, RESPONDENTS.

Jan. 25.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 98, 107—*Formation and Width of Streets—Time of Commission of Offence.*

By s. 98 of the Metropolis Management Amendment Act, 1862, no existing road or way being of less width than forty feet shall (after 1862) be formed or laid out for building as a street for the purposes of carriage traffic, unless it be widened to the full width of forty feet, the measurement to be taken half on either side from the centre of the roadway to the external wall or front of the houses; but when forecourts are intended to be left in front of the houses, the width shall be measured from the fence dividing the forecourts from the public way. By s. 107, no person is to be liable to penalties unless complaint be made within six months after the commission or discovery of the offence.

In 1864 several plots of land abutting on one side of a lane were sold for building purposes; the lane was an ancient carriage way, and had buildings at intervals on both sides erected before 1862; the lane varied in width from forty one feet to twenty eight feet, which was the width opposite the plots, and on the other side of the road was a permanent inclosure belonging to a church and other buildings erected before 1862. In July, 1865, A. bought the plots, houses having been built on two of them, the front walls of the houses being twenty seven feet from the old wooden boundary fence of the lane. On the 26th of September, 1865, A. began to remove this fence, which had been left untouched, and to substitute a permanent wall and railing, and the work was completed on the 14th of October. On the 6th of October the Board of Works were informed of what A. was doing, and in March, 1866, they laid an information against him to recover penalties for contravening the statute. At the hearing the magistrate found that A., by taking down the old fence and erecting the permanent fence, did

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begin to form and lay out the road for building as a street on the 26th of September, and completed such forming on the 14th of October; that the road was not required by s. 98 to be widened to forty feet from the opposite fence, but only to the width of twenty feet from the centre of the roadway to the boundary fence of A.'s ground; and he convicted A. in certain penalties:—

Held, that the conviction was right.

CASE stated by one of the metropolitan police magistrates, under 20 & 21 Vict. c. 43.

This is an appeal against an order made on the 14th of June, 1866, sustaining in part a complaint of the respondents against the appellant, founded on a bye law of the respondents as to the formation of new streets in the metropolis, purporting to be made and published under 18 & 19 Vict. c. 120 (the Metropolis Management Act, 1855), and also on s. 98 of 25 & 26 Vict. c. 102 (the Metropolis Management Amendment Act, 1862). (1)

The complaint was laid on the 29th of March, 1866, and the summons came on for hearing on the 4th of April, 1866.

The summons recited that an information and complaint had been made, that after the making, approving, and publishing of a bye law of the respondents, and the enactment of s. 98 of 25 & 26 Vict. c. 102, on or about the 22nd of January, 1866, the respondents gave notice, under the bye law, to the appellant that he had erected, or caused to be erected, certain buildings and

(1) 25 & 26 Vict. c. 102, s. 98: "No existing road, passage, or way, being of a less width than forty feet, shall be hereafter (7th of August, 1862) formed or laid out for building as a street for the purposes of carriage traffic unless such road, passage, or way be widened to the full width of forty feet, the measurement of the width of such street to be taken half on either side from the centre or crown of the roadway to the external wall or front of the houses or buildings erected or intended to be erected on each side thereof; but where forecourts or other spaces are intended to be left in front of the houses or buildings, then the width shall be measured up to the fence or boundary dividing or intended to divide such forecourts or spaces from the public way, or for the purposes of foot traffic only, unless such road, passage, or way be widened to the full width of twenty feet measured as aforesaid; or unless such streets respectively shall be open at both ends from the ground upwards: and any road, passage, or way hereafter to be formed or laid out for either of the purposes aforesaid shall be deemed to be a new street, and become subject to all the provisions of the recited acts (Metropolis Management Acts), and to the provisions and penalties of and under any bye laws made or to be made in pursuance thereof, in relation to sewerage, drainage, or paving, and to width, construction, surface, inclination, and other requirements and particulars."

boundary walls on ground forming lots Nos. 4 to 10 in Wandsworth Lane, Tooting, in the county of Surrey, within the limits of the metropolis, as defined by the Metropolis Management Act, 1855, whereby the road or lane has been formed and laid out for building as a street for the purposes of carriage traffic by the appellant, and was and is of less width than forty feet, as defined and described by the bye laws and statute, that is to say of the width of twenty eight feet only, contrary to the bye law and to the statute in that behalf. And commanded the appellant to appear on the 4th of April, 1866, to answer to the said information and complaint of the said Metropolitan Board of Works, and to be further dealt with according to law.

The bye law referred to in the summons was made and published on or about the 1st of May, 1857, and was so far as material for the present case as follows: "Forty feet at the least shall be the width of every new street intended for carriage traffic, twenty feet at the least shall be the width of every new street intended only for foot traffic. Provided that the said widths respectively shall be construed to mean the width of the carriage and footway only, exclusive of any gardens, forecourts, open areas, or other spaces in front of the houses or buildings erected or intended to be erected in any street."

"Every new street shall, unless the Metropolitan Board of Works otherwise consent in writing, have at least two entrances of the full width of such street, and shall be open from the ground upwards."

"In this bye law the word street shall be interpreted to apply to and include any highway, except the carriage way of any turnpike road, and any road, public bridge, not being a county bridge, lane, footway, square, &c., and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage."

"In case of any breach of the regulations contained in this bye law, the offender shall be liable for each offence to a penalty of forty shillings, and in case of a continuing offence, to a further penalty of twenty shillings, for each day after notice thereof from the Metropolitan Board of Works."

The facts as admitted on both sides were as follows:—

The appellant had become owner of a piece of ground on the

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western side of Wandsworth Lane, Tooting, consisting of building plots (numbered 4 to 10, beginning from the south), abutting on that road. And the piece of ground was, at the date of the purchase thereof, and still is in part, separated from the lane by an oak fence six feet high, supported by posts let into the ground at intervals of five feet, and sunk four feet below the surface.

Wandsworth Lane is an ancient carriage way, extending from the high road to Tooting on the south to Wandsworth Common on the north, and varies in width, being in many parts less than forty feet wide, and varying, opposite the appellant's ground, from forty one feet towards the north, to twenty eight feet towards the south. There are houses and buildings on each side of the road, the greater part of which were erected before the 7th of August, 1862, and some of such buildings stand within twenty feet of the centre of the road. Wandsworth Lane opposite to the appellant's ground is bounded at the south by the permanent enclosure of Trinity Church and adjacent buildings, erected several years ago, prior to the passing of the statute of 1862, and also the entrance to a new road to Balham, called Nicholas Road, and beyond that, northward, a hedge fence continues as the boundary of ground open for building purposes; but no part of the land opposite is the property of the appellant.

In the year 1864 the ground in question was, with other ground adjoining, sold by auction in twelve lots suitable for building purposes, and Mr. J. T. Wright became the purchaser of the lots 4 to 10; and in September, 1864, when Wright proposed to build, he submitted a plan to the respondents for approval, by letter, dated the 12th of September, 1864, and the respondents thereupon, on the 30th of September, 1864, required that the road in front should be made forty feet wide before the buildings were commenced. To this requirement Wright objected.

Wright or his builder afterwards proceeded with the erection of two houses on the plots Nos. 4 and 5, the front walls of the houses being at a distance of twenty seven feet from the then boundary of the road; the width of the road from that boundary to the enclosure of Trinity Church, &c., being about twenty eight feet four inches.

During the progress of the building some correspondence passed

between Wright and the Wandsworth District Board of Works relative to the drainage of the houses, and the fees in respect of the houses were duly paid to the district surveyor, and the return thereof made by him to the respondents, in pursuance of s. 52 of 18 & 19 Vict. c. 122.

In July, 1865, Wright sold the two houses to the appellant, who being in occupation of one house, and paying rates and taxes, on the 26th of September, 1865, began to remove the wooden fence in front of the houses, and to substitute a dwarf brick wall with iron palisades thereon, which was completed on the 14th of October, 1865.

On the 6th of October, 1865, the respondents received a notice by letter, dated the 5th of October, 1865, from the clerk to the Board of Works for Wandsworth district, within whose jurisdiction the ground is situate, to the effect that a wall was being built along the line of the old fence, in front of the houses then being built by Wright, which would leave the road only twenty eight feet four inches wide, and requesting that the necessary proceedings might be taken to enforce the respondents' order upon Wright's application before stated.

The letter of the 5th of October, 1865, written by the clerk of the district board, was written by their direction upon the report of the local surveyor; and it appears that there is no special officer of the respondents deputed to look to such offences, and that the respondents have issued a circular to the several local boards of the metropolis requesting them to report any infringement of any of their orders or bye laws in respect of new streets.

On the 23rd of January, 1866, a notice accompanied by a copy of the respondents' bye laws was served on the appellant. The notice recited s. 98 of the act of 1862, and referred to the above bye law relative to the formation of streets, and continued, "And whereas certain buildings and boundary walls have been erected, or are in progress of erection, by you, the appellant, on ground forming lots Nos. 4 to 10 in Wandsworth Lane, and at a less distance than forty feet from the opposite boundary wall of Trinity Church and premises adjoining. Now therefore I, by order of the board, do hereby give you notice that, the said lane being of less width than forty feet, that is to say, twenty eight feet only,

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the buildings and walls now being erected by you, and abutting upon the said lane, without the approval of the Metropolitan Board of Works, are contrary to law; and I hereby, by order of and on behalf of the board, require you to comply with the requirements of the law, and to cease any buildings contrary thereto, subject to the penalty in the same bye law provided, of 20s. for each day during which you fail therein." (Signed by the solicitor to the respondents.)

The respondents contended before the magistrate that by s. 98 of 25 & 26 Vict. c. 102, as interpreted by s. 112 (1) of the same act, they are warranted in requiring the width of the lane to be made at least forty feet from the opposite side of the road, along the whole extent of the property intended to be built upon by the appellant.

The appellant contended: first, that there was no proof of any offence within the meaning of the statute, and that the offence, if any, alleged in the summons, was committed before his ownership of the ground commenced; secondly, that the offence, if any, was committed and discovered by the respondents more than six months before the complaint whereon the summons was issued, and that his liability to the penalty was barred by s. 107 of 25 & 26 Vict. c. 102 (2); thirdly, that Wandsworth Lane was formed or laid out for building as a street, for the purposes of carriage traffic, before the passing of the statute; fourthly, that s. 98 prescribes the mode in which an existing road is to be formed or laid out for building as a street for the purpose of carriage traffic, and that the respondents' bye laws are not applicable to the formation of such a street, and that such a street is not a new street until it is formed, and that the respondents have power to make bye laws in respect of new streets only under s. 102 of 18 & 19

(1) 25 & 26 Vict. c. 102, s. 112 (inter alia): "The expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street."

(2) 25 & 26 Vict. c. 102, s. 107 (after repealing s. 233 of 18 & 19 Vict. c. 120): "No person shall be liable for the payment of any penalty or forfeiture under the recited acts or this act, or any bye law made by virtue thereof, for any offence made cognisable before a justice, unless the complaint respecting such offence have been made before such justice within six months next after the commission or discovery of such offence."

Vict. c. 120; fifthly, that ss. 98 and 112 of 25 & 26 Vict. c. 102, and the bye laws, were not intended to effect a widening of a road by piecemeal, or on one side of such road only.

The magistrate was of opinion on the above facts, first, that the appellant by taking down the boundary wooden fence, and in lieu thereof erecting a brick wall and iron palisades, did commence to form and lay out the road for building as a street, for the purposes of carriage traffic, on the 26th of September, 1865, and completed such forming and laying out within the meaning of ss. 98 and 112 of 25 & 26 Vict. c. 102 on the 14th of October, 1865; secondly, that the respondents did not discover such forming and laying out until the 6th of October, 1865; thirdly, that such road was not required by 25 & 26 Vict. c. 102, s. 98 to be widened to the full width of forty feet from the opposite fence of such road, but only to the width of twenty feet from the centre of the roadway to the boundary wall dividing the appellant's ground from the public way.

He thereupon determined that the appellant was liable to a penalty of 40*s.* and 2*s.* costs, and adjudged that he should pay the same accordingly.

The question for the opinion of the Court was, whether upon the facts above stated the appellant was liable to such penalty.

Mellish, Q.C. (*Raymond* with him), for the respondents. This case is within s. 98 of 25 & 26 Vict. c. 102; the lane, though it had buildings on both sides, was not a street; but as soon as so many buildings are built, or intended to be built, as to form a continuous line, then it is formed into a street.

[BLACKBURN, J., referred to *Reg.* v. *Fullford.* (1)]

This need not be done on both sides at once; s. 112 defines a new street as "all streets hereafter to be formed or laid out, and a part of any such street;" and if one side of a road be laid out for building as a street, then s. 98 comes into operation, and the person building must leave twenty feet of road, from the centre or crown of the roadway. Though it might be contended that he must leave the whole forty feet between his own fence and the opposite fence. Lastly, the appellant committed the offence within six

(1) 33 L. J. (M.C.) 122; Leigh & Cave, 403; 10 Jur. N.S. 522.

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months of the laying of the information. It was not necessary to interfere till he had shewn what width he intended to leave as the roadway by putting up the permanent fence in front of the houses; the houses were built so far back that they could not be objected to.

Field, Q.C. (*Joyce* and *A. Rogers* with him). This lane was not such a road as the statute contemplated; it had already been built upon before 1862; and consequently cannot be widened. If, however, any offence within the section has been committed, it was committed by Wright before the appellant bought the land; it is clear the road was laid out for building as a street, if at all, when the houses were begun to be built. And the mere change of one fence for another is not the offence contemplated by the section.

COCKBURN, C.J. I am of opinion that the conviction is right. The legislature evidently seems to have intended by s. 98 that in future, where existing lanes, or ways, or other passages, of less width than forty feet, are intended to be laid out into streets for carriage traffic, with buildings on both sides or on one side or the other, the way or passage before it is applied to such a purpose shall be made of the width of forty feet. Now, taking the enactment according to the construction which might be put upon it, I think it might be construed thus, taking it in all its strictness, that when there are buildings not constituting a street on either side, or constituting a street on one side but not on the other, and the owner of property on the other side wanted to build so as to make a street on that side, it would be incumbent upon him to move back his line of building on his own side, so as to give an entire width of forty feet between his own line and the line of opposite houses. But I think the section is capable of a more liberal and equitable construction. From the fact of the legislature having made the crown of the road the point of measurement, from which the twenty feet on either side are to be ascertained, I think it may well be inferred that a person building on either side of such a road must take care in building to keep twenty feet from the crown of the road. Thus: if an owner began to build or lay out ground for building on one side of such a highway, the other side not being as yet constructed or intended as a street, it would be

enough if he keeps on his side twenty feet from the crown of the road, so that, if afterwards the owners of the land on the other side should propose to convert that side also into a continuous street, they being under the same obligation to leave twenty feet from the crown of the road, when the road should have been converted into a street, in the common acceptation of the word, with continuous buildings on both sides, there should be an entire width of road of forty feet from side to side, which it was the intention of the legislature a street should have. Giving this more liberal construction to the section, the question is, what has the appellant done? Has he in laying out this road for building left twenty feet of way from the crown of the road? It appears that he has not. The magistrate finds, and I think his finding well warranted, that the appellant is an offender by having built his permanent fence within twenty feet of the crown of the road: for the line of houses is twenty seven feet on the other side of this fence.

BLACKBURN, J. I am of the same opinion. I think s. 98, by the language which it uses, means, where there is a road already existing, that if the owner of land adjoining the road shews his intention to build to such an extent along the side of the road as that, when the building is completed, that side of the road will form a street, the road must be left forty feet in width. Whether the intended building is sufficient to make a street is a question of more or less; one house would not be sufficient. Whether the intended houses are sufficiently numerous and continuous is a question of degree, and must be a question of fact for the magistrate.

The next question is, when may the owner be said to have begun to lay out the road for that purpose? I do not think that if a person merely puts up a boarding, or leaves the way without any fence, or leaves the old fence untouched while he is building, he can be said to have laid out the road; but as soon as he begins to put up fences, and marks out the boundary which he intends to be the permanent boundary between his building and the road, then he may be said to have begun to lay out the road for the forming of the street within the meaning of the act; and this also is a question of fact for the magistrate.

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In the present case, it seems to me, the magistrate's finding is perfectly correct. There was an intention to build a certain number of houses on Mr. Taylor's land along that side of the road. There was an intention of building sufficient to shew an intention to lay the road out for building as a street. The magistrate has also found as a fact that the old wooden fence, which had been left standing untouched during the building of the houses, had been removed, and a new brick wall and iron railings made, which fence was intended to be the permament boundary of the street.

Then it appears that this new fence or boundary is within twenty feet of the crown of the road. The magistrate has expressed his opinion that the appellant was not bound to do more than to lay out his fence twenty feet from the crown of the road; but he has not done this, and consequently the appellant is wrong, and liable to a penalty, in any view of the statute. I agree with my Lord, that giving a reasonable construction to the words of the 98th section, it may be fairly said in favour of the appellant that he was not bound to remove the fence further back than twenty feet from the centre of the road, and was not bound to make it forty feet from the boundary on the other side of the road, though that point does not seem precisely raised. But I think that would be a fair and equitable construction of the act, if the point were directly raised. But the magistrate having found as a fact that the appellant's fence is within twenty feet of the crown of the road, and also that he intended to lay out the road as a street, I think the conviction quite right.

LUSH, J., concurred.

Judgment for the respondents.

Attorney for appellant: *Bullen.*
Attorney for respondents: *Solicitor to the Board of Works.*

[IN THE EXCHEQUER CHAMBER.]

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BRAND AND WIFE *v.* THE HAMMERSMITH AND CITY RAILWAY COMPANY.

Railway—Compensation—Lands injuriously affected—Nuisance by Vibration, Noise, and Smoke, after construction of Railway—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18) *s.* 68—*Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 6 *and* 16.

The owner of a house, none of whose lands have been taken for the purposes of the railway, can recover, against the company who constructed the railway, compensation under ss. 6 and 16 of the Railways Clauses Consolidation Act, 1845, in respect of injury to the house (which, though not structural, depreciates its value), caused by vibration, smoke, and noise, in running locomotives, by another company, with trains in the ordinary manner, after the construction of the railway.

So held, reversing the judgment of the Court of Queen's Bench, by Bramwell, B., Keating and Montague Smith, JJ.; Channell, B., dissenting.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendants on a special case. (1)

The action was brought by the plaintiffs against the defendants to recover 272*l.*, balance of 1114*l.*, the amount for which judgment had been recovered by the female plaintiff against the defendants upon an inquisition, held before the sheriff under the Lands Clauses Consolidation Act, 1845, to assess compensation to be paid by the defendants to the female plaintiff for injury sustained by a certain house, buildings, garden, and land having been and being injuriously affected by reason of the execution or construction of the railway and works authorized by the defendants' acts of parliament and acts incorporated therewith.

The defendants under their special act, incorporating the Lands and the Railways Clauses Consolidation Acts, constructed the railway, which crosses the Uxbridge Road, near the house of the female plaintiff, on a viaduct of brick arches, about nineteen feet above the level of the ground.

The railway is not and never has been worked by the defendants, but is and has always been worked by the Great Western Railway Company since it was opened for traffic; it is worked by that com-

(1) Law Rep. 1 Q. B. 130.

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pany as a passenger railway only, and in the usual and ordinary manner.

No part of the female plaintiff's land was ever entered upon, or taken, or used by the defendants, permanently or temporarily.

On the inquiry before the sheriff compensation was claimed: 1. For the obstruction of light, and air, and way. 2. For damage to the garden by lime dust in the course of the construction of the railway. 3. That the working of the railway and the running of trains over it, after it had been constructed and opened for traffic, had occasioned, and always would occasion, vibration, noise, and smoke; and that the premises, by reason of their being subjected to such vibration, noise, and smoke from passing trains, were and always would be affected and further depreciated in value.

The defendants did not dispute the right to compensation under the first and second head. As to the third head of claim, it did not appear that any structural injury was or would be caused to the house or any of its outbuildings by the construction of the railway; but it appeared, and is now admitted, that by reason of the working of the railway after it had been opened for traffic the house and buildings were and would be subjected to vibration, noise, and smoke, from passing trains, and were and always would be affected and depreciated and lessened in value thereby; but it was objected that the claim to *compensation* could not be supported.

The jury assessed the compensation in respect of this depreciation at 272*l.*

The question for the opinion of the Court was, whether the female plaintiff was entitled to have compensation made to her by the defendants in respect of this head of claim.

The Court of Queen's Bench (Mellor and Lush, JJ.) gave judgment for the defendants (1), holding that the female plaintiff was not entitled to this head of compensation under either the Lands Clauses Consolidation Act or the Railways Clauses Consolidation Act; for that the compensation under those statutes was confined to damage sustained by the execution of the works. (2)

(1) See Law Rep. 1 Q.B. 130, where the case is set out at length.

(2) Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 68. "If any party shall be entitled to any compensation in respect of lands, or of any

May 10, 1866. *Mellish, Q.C.* (*Hawkins, Q.C.*, and *Dixon* with him), for the plaintiffs. The defendants are authorized by the legislature to construct a railway, and for ever at their free will

interest therein, which shall have been taken for or injuriously affected *by the execution of the works*, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit." [The section then enacts the mode of procedure by arbitration or before a sheriff's jury.]

Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20). "And with respect to the construction of the railway and the works connected therewith, be it enacted as follows:

s. 6. "In exercising the power given to the company by the special act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this act and in the Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or *injuriously affected by the construction thereof*, full compensation for the value of the lands so taken or used, *and for all damage* sustained by such owners, occupiers, and other parties, *by reason of the exercise as regards such lands, of the powers* by this or the special act, or any act incorporated therewith, vested in the company; and, except where otherwise provided by this or the special act, the amount of such compensation shall be ascertained and determined in the manner provided by the Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the last mentioned act shall be applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof."

s. 16. "Subject to the provisions and restrictions in this and the special act, and any act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works:

"They may construct in, upon, across, under, or over any lands, streets, &c., tunnels, embankments, &c.

"They may alter the course of rivers not navigable, &c.

"They may make drains, &c.

"They may erect houses, warehouses, offices, &c., as they think proper.

"They may, from time to time, alter, repair, or discontinue the before mentioned works.

"They may do all other acts necessary for making, maintaining, altering, or repairing, and *using* the railway.

"Provided always, that in the exercise of the powers by this or the special act granted, the company shall do as little damage as can be, and shall make full satisfaction, in manner herein, and in the special act, and any act incorporated therewith, provided, to all parties interested, for all damage by them sustained, *by reason of the exercise of such powers.*"

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and pleasure to run trains, notwithstanding that by so doing they shake the neighbouring houses. The effect of this is to create a permanent easement, and as between the defendants and the adjoining owners of land a servient and dominant tenement is established. This right is an easement: for if a man, without parliamentary authority, were to do these acts on his own land, an action would lie against him; but if they were continued for twenty years he would gain a right to commit them. That which in the first instance is a private nuisance, after twenty years existence is legalized and becomes an easement: here the act of parliament has legalized a nuisance which at once becomes an easement. The defendants, therefore, have an easement which creates a servitude on the plaintiffs' land, and if their land is made servient to the defendants' railway, they, as owners of the servient tenement, are entitled to be compensated. This is a reasonable proposition, because if by an act of parliament a man's land is made servient to another's land, it deprives him of the free use of his property just as much as if an acre of his land had been taken from him; and the general intention of the legislature is, that no one should be deprived of his real property without compensation; and unless there are express words taking away compensation, the Lands Clauses and Railways Clauses Consolidation Acts ought to be construed so as to give compensation to all persons who are deprived of their property, or whose property is injuriously affected. The question mainly turns on s. 6 of the Railways Clauses Act (8 Vict. c. 20). Although that act recites that it is expedient to comprise in one act the provisions introduced into acts of parliament authorizing "the construction of railways," there are numerous clauses in it which refer not only to the construction, but to things occurring after the railway is constructed. Section 6 enacts that "the company shall make to the owners, &c., interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used and for all damage sustained by such owners, &c., by reason of the exercise, as regards such lands, of the powers of this or the special act." Section 86 empowers the company to use and employ engines and carriages and waggons, and to carry and convey passengers and goods.

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Now, the power to use engines under s. 86 is one of the powers granted by this act to the company within the meaning of s. 6, and the plaintiffs, as owners of land injuriously affected, are entitled to compensation for damage sustained by reason of the exercise of such power. The difficulty arises from the words "by the construction thereof." But if this section is construed with reference to the general intention of the legislature, viz. that where a person is deprived of a right he shall be compensated, and also with reference to the words "by reason of the exercise of the powers of the act," and instead of a narrow a liberal construction is put upon it, those words may fairly be construed to mean "by reason of the railway having been constructed." By s. 92 all persons are entitled to use the railway. The result of these sections is, that the defendants may use the railway, and they are bound to allow other persons to use it, and if any injury be done to real property in using it, no action will lie against them: *Rex* v. *Pease* (1); *Vaughan* v. *Taff Vale Railway Company* (2); but they are to make compensation to the persons whose property is injured. The defendants rely on the language of s. 68 of the Lands Clauses Act (8 Vict. c. 18), and contend that that section limits the compensation to those cases where the lands are injuriously affected by the execution of the works. If the different sections of the Lands Clauses Act are looked at, it will be found that the language is not very accurate, and that the expressions, "exercise of the powers" and "execution of the works," are used indiscriminately throughout the act. In s. 18 the words are "by reason of the execution of the works;" in s. 22, "by the execution of the undertaking;" s. 38 reverts to the expression "execution of the works;" in ss. 49 and 63 it is "by the exercise of the powers of the act;" and in s. 68 "by reason of the execution of the works." These expressions, therefore, must not be construed strictly, but according to the general intention of the legislature. Section 16 of the Railways Clauses Act in effect provides that compensation shall be made for all damage done in maintaining, repairing, and *using* the railway; that section, therefore, does not confine the compensation to be made to damage done during the construction, but also to cases of damage sustained after the construction of the railway.

(1) 4 B. & Ad. 30

(2) 5 H. & N. 679; 29 L. J. (Ex.) 247.

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There is no case which has decided that the plaintiffs are not entitled to compensation. *Penny* v. *South Eastern Railway Company* (1) only decided that compensation for loss of privacy could not be recovered under s. 68 of the Lands Clauses Consolidation Act. That may be conceded. In *Glover* v. *North Staffordshire Railway Company* (2), it was held that compensation might be given for depreciation to property caused by the erection of gates, and in Lord Campbell's opinion also by the liability to danger from passing trains. The damage in that case was caused principally by the *user* of the line, and it is, therefore, directly in the plaintiffs' favour.

[CHANNELL, B. In that case the railway company obstructed the only access the plaintiff had to his house; his land therefore was injuriously affected, and he was clearly entitled to compensation in respect of that. That is all that was decided.]

The case of *Stockport, Timperly, and Altringham Railway Company* (3) shews that the risk from fire owing to the user of the railway may be taken into consideration in assessing compensation. *Chamberlain* v. *West End of London Railway Company* (4), and *Ricket* v. *Metropolitan Railway Company* (5), have no application to the present case. *London and North Western Railway Company* v. *Bradley* (6) only decides that a court of equity will not restrain the issuing of the warrant to the sheriff.

[BRAMWELL, B., referred to *Turner* v. *Sheffield and Rotherham Railway Company*. (7)]

Karslake, Q.C. (*Horace Lloyd* with him), for the defendants. A railway is a highway which all persons are entitled to use, and no permanent easements can be created as between the persons who use the railway and the occupiers of the adjoining houses. By 24 & 25 Vict. c. 70, and 28 & 29 Vict. c. 83, locomotives may be used under certain restrictions on turnpike roads: but it never could be contended that persons using the roads could acquire an easement of any kind. The user of the railway or of the road may cause an annoy-

(1) 7 E. & B. 660; 26 L. J. (Q.B.) 225.
(2) 16 Q. B. 912; 20 L. J. (Q.B.) 376.
(3) 33 L. J. (Q.B.) 251.
(4) 2 B. & S. 605; 32 L.J. (Q.B.) 173.
(5) 5 B. & S. 149; 34 L. J. (Q.B.) 257.
(6) 6 Railway Cases, 551.
(7) 10 M. & W. 425.

ance to the owners of the adjoining houses by vibration, noise, and smoke; but as it is a nuisance to the whole community no action would lie, and it is not indictable because it is legalized quoad the public: *Rex* v. *Pease.* (1) Where the legislature allows a railway to be made, and trains to be run on it, it impliedly permits the company who run trains to make noise and smoke, and cause vibration, as this is the necessary consequence of running trains: *Vaughan* v. *Taff Vale Railway Company.* (2) No structural injury is done to the plaintiffs' house, the injury or annoyance is merely personal; the reversioner would have no right of action in respect of it; the occupier, though annoyed by the running of trains, would continue to pay the same rent, and the landlord would be in no way injured. Even if the house is depreciated in value the plaintiffs would have no right of action: *Caledonian Railway Company* v. *Ogilvy* (3); to entitle the owner to compensation, his land must have been taken or injuriously affected. Moreover, the compensation must be assessed once for all: *Broadbent* v. *Imperial Gas Company.* (4) On what principle is the extent of the future damage to be estimated? Is it to be assessed on the assumption that three trains would run daily, or a hundred? An ordinary train might cause no vibration, and express trains might cause some; and much also might depend upon the number of carriages attached to the train; there is no mode by which the future damage could be calculated. In the present case it is not caused by the defendants, but by the Great Western Company who use the line, so that if the plaintiffs are entitled to recover they would recover compensation from the defendants in respect of damage which they have not caused.

It appears to be conceded that compensation can only be claimed under s. 6 or s. 16, of the Railways Clauses Consolidation Act. The group of sections of which s. 6 is one, commences with a preamble which limits the general language of those sections "to the construction of the railway and the works connected therewith;" and by s. 6 compensation is to be made to the owners and occupiers of any land taken or used for the purposes of the railway, or injuriously affected by the construction thereof. The present case does not

(1) 4 B. & Ad. 30.
(2) 5 H. & N. 679; 29 L. J. (Ex.) 247.
(3) 2 Macq. 229.
(4) 7 De G. M. & G. 436; 26 L. J. (Ch.) 276, affirmed in H. L. 7 H. L. C. 600.

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come within the section, and the plaintiffs are therefore not entitled to any compensation. The exercise of the powers of the act mentioned in s. 16 is confined by the preamble to the execution of the works necessary "for the purpose of constructing the railway or the accommodation works connected therewith." Those are the only sections relied on by the plaintiffs: there is therefore no section in either of the acts which entitles the plaintiffs to compensation for a nuisance caused by running trains on a railway after it is made.

Mellish, Q.C., in reply.

Cur. adv. vult.

Feb. 1. The following judgments were delivered:—

BRAMWELL B. This case was argued after last Easter Term; of the judges then present, Erle, C.J., and Pollock, C.B., are no longer members of the Court; my Brothers Byles and Pigott also take no part in the judgment, not having heard the whole of the argument; the only judges, therefore, who take part in the judgment are my Brothers Channell, Keating, Montague Smith, and myself.

In this case the plaintiff Mary is owner of a house and land adjoining the defendants' railway. That railway is not worked by the defendants, but is by another company. By the ordinary working of a railway line—by the passing of the trains without negligence or design—by what, in short, is practically necessary (as we are told) for the using of the line, a nuisance was created to the occupiers of the plaintiff's premises, which would have been actionable at common law. As presumably this nuisance will continue, the premises are permanently depreciated in value to sell, let, or occupy. Now for this the plaintiffs may be entitled to a remedy under the compensation clauses; or, maybe, it is to be sought by the occupiers from time to time by action; or, maybe, there is no remedy. The latter seems to be impossible. It seems impossible that it can have been enacted that this damage can be done without any compensation. But one reason for such a state of things is given, and that is one I can treat with respect only on account of the respect due to those who have used it. It is said that the railway and the working of it are for the public

benefit, and therefore the damage must be done and *be uncompensated*. Admitting the damage must be done for the public benefit, that is no reason why no *compensation* should be given. It is to be remembered that that compensation comes from the public which gets the benefit. It comes from those who do the damage, but ultimately from the public in the fares they pay. If the fares will not pay for this damage, and a fair profit on the companies' capital, the speculation is a losing one, as all the gain does not pay all the loss and leave a fair profit. Either, therefore, the railway ought not to be made, or the damage may well be paid for. But, further, though if it were the law and practice to do individuals a damage for the benefit of the public without compensation, no one in particular could complain when it happened to him, as every one would know he held his property subject to being deprived of it, or having it injured when it suited the public; still such a law and practice would be highly inconvenient and mischievous. It is, however, idle to discuss such a question, as the legislature has acted under no such considerations. For if the public benefit is a good reason for damaging a man's property without compensation, so would it be for taking it without compensation. The legislature has made the most careful and minute provisions for the payment of compensation for everything taken, and, indeed, for everything injuriously affected. And it is absurd to suppose that it was intended that if a house was damaged to the extent of 1*l.* a year by its light and air being diminished, compensation should be given, and intended it should not be where the damage was ten times as great, but caused by the noise and vibration of the trains. I approach the consideration of this case, therefore, with the certainty that it was not meant that these plaintiffs should be without remedy and with the strong belief that one will be found for them. But is it by action or under the compensation clauses of the statutes? My own opinion, if free, would say the former, and for the following reasons. The common law right of action for a common law nuisance is not in terms taken away; the right to compensation is not clearly given. It is said the right of action is by implication taken away by the clauses permitting the use of locomotives. I should have expected express words to that effect if it had been intended. It is a very

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strong thing to say that an actionable nuisance and damage may be inflicted on another, and that by implication the right of action is taken away. But I am clearly of opinion that no such thing was intended.

To understand the meaning of these clauses, it is necessary to trace their origin. The statutes, the Lands and Railways Clauses Acts, themselves recite that such clauses, as are contained in them, "usually" appear in acts of parliament, authorizing the taking of land and the construction of railways, and that it is desirable to avoid the necessity of repeating them. They ought therefore to have no greater or other effect in those general acts than they had in the particular. Now it is not supposable that in a private act for a particular company, an anomaly so great was to be introduced, as that an actionable nuisance might be committed with no common law remedy, and for the benefit of the undertaking, that their profits might be larger, and that this should be done without express words. But, further, I contend, the words do not mean nor imply it. The general heading of the sections, supposed to authorize a nuisance without remedy, is "with respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon." The first of the following sections, s. 86, is for the purpose of allowing the company to be carriers on their own line, which otherwise would have been ultra vires, and of limiting the charges they could make. "The company" wanted no law to enable them to use a locomotive, any more than it did to use "other moving power, and carriages, and waggons," except to avoid the objection of ultra vires. A man may use a locomotive on his soil and freehold, and so may a corporation. They do want, that is to say, they do not possess, the power to use it, so as to be a nuisance to their neighbours. But if this were intended to be given, where are the words? The words are sufficient if meant to give vires ultra those of a company to make a railway, but insufficient if meant to authorize the doing of damage. Besides, the use of other moving power and of carriages and waggons is authorized. In what sense? That a nuisance may be committed by their use without remedy? Impossible, for it was never contemplated they would be a nuisance. Section 87 clearly also gives power of contracting with other companies, and has no thought of

authorizing nuisances. So ss. 88 and 89, 90 and 91. Section 92 gives other companies and persons a right to use the railway, with engines and carriages "properly constructed as by this and the special act directed." The object of this was to define the rights of the public over the line as against the company, not to authorize nuisances. All these sections down to and including s. 113 have the same object, viz. regulating the use of the railway by the company and others. But it is said s. 114 shews that the interests of others were in view of the legislature, and that they made thereby what they thought was sufficient provision for that object. The argument is, with all submission, idle. They provided for this matter certainly. They said, we will not let it be discussed whether this is a nuisance. Did they, therefore, say nothing else shall be, or, if it is, it shall be remediless? Certainly not. I cannot, therefore, see anything in these sections to take away the common law right. And undoubtedly there is greater difficulty in supposing there is a remedy by compensation once for all. It is difficult to ascertain the amount of injury. The traffic may double. Branch lines may be made. Further, it is not contended by those who say that the common law remedy is gone, that there is an unlimited right to damage, but only a right to do reasonable mischief, or a reasonable right to do mischief. That is to say, if by going a little slower, or being at a little more expense, or some other inconvenience, mischief can be avoided, it must be. But on what principle is this to be settled? Ten trains a day at twenty miles an hour might be no nuisance. This might accommodate the public and pay a dividend. But fifty trains a day at thirty miles an hour might be a grievous nuisance, though much better for the public and the company. Where is the line to be drawn? Take the case of the plaintiff in *Vaughan* v. *Taff Vale Railway Company*. (1) There the company declared that they went as slowly as they could, and with every contrivance for safety. But they might have had one servant, or ten, or a thousand at the spot in question, to prevent their grass catching fire and burning the plaintiff's wood. This would have cost them money, and it was cheaper to burn the wood, or, at all events, on a calculation of chances, better to risk doing so, than to have a sufficient number

(1) 5 H. & N. 679; 29 L. J. (Ex.) 247.

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of servants; but how is compensation to be calculated for such a matter? Moreover, if these plaintiffs are entitled, so is the owner of every piece of land near the railway. For though there may be no house on it now, it is possible there would have been; but that is now prevented by the railway, at least to the same advantage as before. Therefore the land is injuriously affected, if this is.

For these reasons I should have thought the right of action not taken away, and the remedy by compensation not given. But the former question is concluded by *Vaughan* v. *Taff Vale Railway Company* (1), which shews that no action would lie in the present case, there being neither negligence, nor misfeasance, nor anything avoidable. Being of opinion then that it never could have been intended that there should be no remedy, I think it right to hold any words that are capable of it to mean to give a remedy by implication. Of course we must not put a meaning on words which they *cannot* bear, to remedy an injustice, however gross. But I think the words "injuriously affected by the construction thereof," and "full compensation for all damage sustained by reason of the exercise as regards such land of the powers, &c.," may, and where it is established there is no right of action, must, have the effect of giving compensation for the damage. For according to the case of *Vaughan* v. *Taff Vale Railway Company* (1), immediately on the construction of the railway, and "by the construction thereof," a right accrued to do this damage. How, then, can it be said the lands are not injuriously affected "by the construction thereof," if they thereby became subject to this? They immediately come under a servitude, as Mr. Mellish put it. Suppose it had been enacted expressly, that on the construction of the railway there should be a right to use it so as to create a nuisance actionable at common law. Would not that have been matter for compensation as much as if it had been enacted the owner should make a grant of such a servitude? But it makes no difference whether it is expressly or otherwise enacted, if it is enacted; and *Vaughan* v. *Taff Vale Railway Company* (1) shews it is. As to the argument that the premises are none the worse, but only the occupiers, it is enough to say the same thing might be said to a claim to compensation for diminished light. It is to be observed the word is not "in," or "during," but

(1) 5 H. & N. 679; 29 L. J. (Ex.) 247.

"by" the construction of the railway. Besides this is a damage sustained by occupiers by an exercise as regards these lands of the powers of the act.

I come, therefore, to the conclusion that the judgment below is wrong, and should be reversed. It is no use my referring to authorities. I agree with the reasoning of the Court below. I am driven by the case of *Vaughan* v. *Taff Vale Railway Company* (1) to hold they are wrong. There is no other case which we are not at liberty to review here, and much of the uncertainty of opinion which has prevailed is attributable to an uncertainty which that case has removed while it continues an authority. And there is this to be said for thus holding, that the defendants will pay once and for all, and not be subject to repeated actions. As to *Rex* v. *Pease* (2), I say, with great respect, the reasons there given are not to my mind satisfactory. The case itself was not one of private wrong, but of public nuisance. In the latter case, if for the public benefit, the public is at once the gainer and loser, and the one may in some sense be set against the other, and so it might have been that without an act of parliament the matter complained of there would have been no public nuisance. But this is not the case of a public but of a private nuisance, where the loser and gainer are not the same to the same extent.

CHANNELL, B. I cannot but express my deep regret, that I feel compelled to differ from the other judges who have to decide this case, and that a case of so much importance, after having been argued before an unusually full Court, should ultimately come to be decided by so small a number of judges. I may add that Erle, C.J., the president of the Court, had prepared a judgment to be delivered after Michaelmas Term, but other members of the Court were not then prepared to give judgment; as Sir W. Erle is no longer a member of the Court, I am not at liberty to refer to that judgment further than to say, that it proposed to affirm the judgment of the Court below, and I was prepared to agree on one of the grounds. (3)

In this case the question for our consideration is, whether com-

(1) 5 H. & N. 679; 29 L. J. (Ex.) 247. (2) 4 B. & Ad. 30.
(3) See the note at the end of the case.

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pensation can be recovered under the Lands or Railways Clauses Consolidation Acts, or under the defendants' special act, for an injury to the plaintiff's house (not amounting to a structural injury) caused by the running of trains on the defendants' railway.

The first point which arises is, whether the plaintiff would have had a good cause of action, if what he complains of had been done on the land of a neighbour without the authority of any act of parliament; that is, whether his complaint is not merely of a nuisance to him in the wide sense in which that word is sometimes used, but of a nuisance which, if not authorized by act of parliament, would have been an actionable one.

It is now, I think, well settled by the decisions of various courts that compensation cannot be recovered under these acts, except where a right of action has been taken away. Whether the converse proposition holds good, that wherever a right of action has been taken away, compensation has been given, is one of the points we have now to determine.

Upon the first point, I think it must be taken on the facts stated in the case, that the plaintiff's complaint is of an actionable nuisance. The jury have found that by the noise, vibration, and smoke, the value of the house is depreciated by 272*l*. I think it must be taken that this amounts to substantial damage and not mere annoyance, and that, therefore, the nuisance would be an actionable one, within the ordinary definition and the rule to be deduced from the recent case of *Bamford* v. *Turnley* (1), reviewing the decision in *Hole* v. *Barlow*. (2) That being so, has the right of action been taken away? This question is, I think, set at rest by *Vaughan* v. *Taff Vale Railway Company* (3) in this court, which is an authority binding upon us here. We must, therefore, I think, hold that the right of action, which, as I think, the plaintiff here would have had if the defendants had been private individuals acting without the sanction of any act of parliament, has been taken away. Does it therefore follow that he has a claim for compensation? It may be *improbable* that the legislature should have intended to take away a right without

(1) 3 B. & S. 62; 31 L. J. (Q.B.) 286.
(2) 4 C. B. (N.S.) 334; 27 L. J. (C.P.) 207.
(3) 5 H. & N. 679; 29 L. J. (Ex.) 247.

giving a claim for compensation, but can it be said to be impossible? Reasons may be stated which the legislature may possibly have acted upon. They may have looked to the gain to the public by the existence of the railroad. The small number of cases in which a real grievance would be caused, and the small amount of damages which would be recovered, as compared with the number of cases in which claims might probably be made, the fact that a remedy was provided or existed for any improper or negligent use of the railway,—these are reasons on which, as it seems to me, the legislature may have acted in enacting, if they have done so, that persons in the position of the plaintiff here should have no claim for compensation. But, as it seems to me, it is not for us to find reasons for the law enacted by parliament. I prefer to put the best construction I can on the words of the act of parliament, and unless the result is one which we can see it is impossible the legislature can have intended, to abide by it. Now, I can see nothing in the various clauses which have been cited to us in the argument which can give the right to compensation. The 68th section of the Lands Clauses Act merely provides for a method of assessing the compensation elsewhere provided for, and confers no right. The 6th and 16th sections of the Railways Clauses Act are relied upon. They come under the general heading, "With respect to the construction of the railway and the works connected therewith," which, if any doubtful words were contained in the sections, would induce me to refer them rather to the construction than the subsequent working of the railway. I do not, however, find anything which does relate to the subsequent working. The 6th section gives compensation to the owners of lands taken by the railway, or injuriously affected "by the construction thereof." No persons, therefore, can claim under this but those whose lands are injuriously affected by the construction of the railway. Then it goes on to say that the compensation shall be paid for all damage sustained by "such" persons by the exercise of the powers of that or the special act. I agree with my Brother Lush, who in his judgment in the court below takes the words "by the exercise of the powers" to be used as equivalent or synonymous with the previous ones, viz. "by the construction thereof." (1) Yet even if this is not so, the use of

(1) See Law Rep. 1 Q.B. at p. 148. 12 Jur NS 238

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larger words afterwards cannot, I think, extend the class of persons to whom the compensation under the section was to be paid, although it might give some of those persons a larger right. Then comes section 16. This enacts that, "for the purpose of constructing the railway or the works connected therewith," the company shall have certain powers, mentioning particularly several powers, all of which relate entirely to the construction, and then says, that they may do "all other acts necessary for making, maintaining, altering, or repairing, and using the railway, provided that in the exercise of the powers of that or the special act they make satisfaction to all persons interested for all damage sustained by them by reason of the exercise of such powers." This section, therefore, gives to the company, upon the condition of their making compensation, certain powers for a certain purpose, viz. the construction of the railway. It gives them power to do all acts necessary for using the railway. This, placed as it is under the general heading, and being given as it is, "for the purpose of constructing the railway," can only mean power to do all acts of construction necessary for using, that is, without which the railway cannot be used, and not all acts of using it when constructed.

The acts of using are authorized, not by this section, but by section 86 and other sections under an appropriate heading, which make no mention of compensation. I can see nothing, then, in the sections which gives a right to compensation for any injurious affection, except one—"by the construction of the works." Then comes the only remaining question, is an injury by the running of trains, which could not happen unless the railway had previously been constructed, an injury by the construction? I do not think, according to the doctrine adopted by our courts, where they have to decide whether one thing is caused by another, that it is so. The maxim, "causa proxima non remota spectatur," seems to apply. I can no more say that this damage by the running of the trains is caused by the construction of the line, than I could that the death of a man is caused by its construction. It could not have taken place without it; but that is not enough. Applying, therefore, the ordinary construction and my best judgment as to the plain and ordinary meaning of the language used, I cannot

find that the right of compensation has been conferred on the plaintiff. I do not think I can imply such a right on the ground that this Court has decided that his only other remedy has been taken away, and that it is quite impossible that the legislature could have intended such a result. I think, therefore, the judgment of the Court below ought to be affirmed.

KEATING, J. I agree with the judgment of my Brother Bramwell, and with his reasons; but I wish to express my concurrence with my Brother Channell in his regret that so important a case should be decided by so small a Court.

MONTAGUE SMITH, J. I also concur in those expressions of regret, but I have come to the same conclusion as my Brother Bramwell.

The defendants, under the powers of an act of parliament, constructed a viaduct with a railway upon it, so near to the plaintiff's house that the passage of light and air to the house was obstructed, and the engines and trains running upon the railway caused such vibration of the house, and so much smoke and noise, as injuriously to affect it and greatly depreciate its value. Before the compensation jury a claim was made in respect of damage arising from these causes. For the purpose of obtaining the opinion of the Court, the claim was divided, and the jury assessed the damages separately, awarding 836*l.* for the obstruction of light and air, and 272*l.* for the injurious affection of the house by the vibration, smoke, and noise. The company admit their liability to make compensation for the obstruction of light and air, but dispute their liability to the residue of the claim, and the question now is, whether the plaintiff is entitled to recover the 272*l.* awarded by the jury in respect of such residue.

The rule of construction is well established that, generally, no compensation can be awarded under the provisions of the statutes which come into question in this case, unless the acts causing the damage in respect of which the claim is made are of such a nature as would have entitled the claimant to maintain an action against the company, if such acts had been done without statutable authority.

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Two questions therefore arise: First, whether a common law right of action would have existed against the company if they had no parliamentary powers; and secondly, if such an action might have been maintained, whether the statute, authorizing the acts causing damage otherwise actionable, has given compensation to the person sustaining the damage.

On the first point (in the discussion of which I of course assume that no statute intervenes), I think the facts are sufficient to establish the existence of a nuisance, giving the plaintiff a right of action against the company. It must be taken on this special case that the vibration and other annoyances were so great as to affect in a sensible degree the ordinary enjoyment of the plaintiff's house, and greatly to diminish its value. Such a noxious disturbance of a man's house, accompanied by such consequences, is surely an actionable wrong to which the great maxim, "sic utere tuo ut alienum non lædas," clearly extends. There can, I think, be no legal answer or excuse for such a wrong, on the ground that the damage is the inevitable consequence of the trade carried on by the company, if carried on at all. The company are volunteers in embarking in the business and in using the land adjoining the plaintiff's house. And I am unable to find any principle or authority for holding that a person or company, building a railway, and employing engines and carriages upon it, are by the common law entitled to greater immunity, when causing damage to others, than the practisers of other useful and longer established trades. I therefore come to the conclusion that, without the protection of the statutes, the company would have been subject to an action at the suit of the plaintiff; and, if authority be wanting in support of that opinion, it will be found, not only in the old cases, but in the following recent decisions: *Bamford* v. *Turnley* (1); *St. Helen's Smelting Company* v. *Tipping* (2), in the House of Lords; and see *Chamberlain* v. *West End and Crystal Palace Railway Company* (3); *Senior* v. *Metropolitan Railway Company.* (4)

The next question, and that on which alone the Court below

(1) 3 B. & S. 62; 31 L. J. (Q.B.) 286.

(2) 35 L. J. (Q.B.) 66; 11 H. L. C. 642.

(3) 2 B. & S. 605, 617; 32 L. J. (Q.B.) 173.

(4) 2 H. & C. 258; 32 L. J. (Ex.) 225.

gave an opinion, is, whether parliament, which, by legalizing the acts of the company, has taken away from the owners of the land their right to recover damages for what would have otherwise been an actionable wrong, has given them a claim to compensation in lieu of it. The company contend for a negative answer to this question; and if they are right, it will follow that, their acts having been (as I agree) authorized by statute, and thereby rendered lawful, the injury, however great, is without remedy. Undoubtedly parliament may have done this; but one certainly would expect to find, in conformity with the most ordinary principles of justice and the usual practice of parliament, that, when the rights of one man are prejudicially affected by legislation for the benefit of others, provision would be made for just and adequate compensation.

It is often hard on individuals to have their property taken or interfered with against their will by a railway company. This private hardship must, however, be endured for the sake of undertakings which, although springing from private enterprise, are of general utility; but it would seem unnecessary, and therefore be oppressive, not only to subject such persons to inconvenience, and their property to depreciation, but to deprive them also of pecuniary compensation. Such persons would in that case obviously bear an unfair, because an unnecessary, burden in comparison with others, for works of public benefit. But, however reasonable provisions for giving compensation in cases like the present may seem to be, the question is, whether they are contained in these statutes or not: for, unless they are, our judgment must be for the defendants.

The provision mainly relied on by the plaintiff's counsel is the 6th section of the Railways Clauses Consolidation Act, 1845. The plaintiff's house has not been taken or used, but it has been injuriously affected in such a way that the injurious affection would have been, but for the statutes, an actionable injury. Is this injury within the scope and meaning of the clause?

The company, having failed to shew that the case is excluded from the operation of the clause by the rule established by the House of Lords in *The Caledonian Railway Company* v. *Ogilvy* (1),

(1) 2 Macq. 229.

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seek to add a further limitation to the right to compensation, based on a distinction between injuries caused by the building of the railway and those caused by the necessary use of it for the very purpose for which it is built, and to exclude the latter from all compensation. They rely on the words, "the construction of the railway," found in the introductory heading of the 6th clause and in the clause itself. The general intention of the legislature, to be collected from the language of the clause, appears to me to be, to give compensation to landowners for injurious affection of their lands by reason of the exercise of any of the powers by the acts vested in the company. Now one of the powers so vested in the company is that of using engines and carriages on the railway (see s. 86). If this power could be practically exercised without causing vibration, smoke, and noise, then the company would not be justified in subjecting the plaintiff and his property to these nuisances, and an action might be brought against the company, notwithstanding the statute, for abusing their powers. But as these annoyances are, as I suppose, the inevitable and necessary results of the ordinary and careful use of engines and carriages on a railway, the legislature must be presumed to have contemplated and legalized, not only such use, but the consequences of it. The right of action, then, is gone, and the redress, if at all, is under the compensation clause: see *Rex* v. *Pease* (1); *Vaughan* v. *Taff Vale Railway Company*. (2)

A further important provision is found in the 16th clause. In that clause, after enacting various things the company may do in constructing the railway, a general power is given in these words: "They may do all other acts necessary for making, maintaining, altering, or repairing, and *using* the railway." It is contended by the company that the 16th clause makes provision only for what is done during the process of construction of the railway. The commencement of the clause has no doubt language bearing that import; but the general power I have quoted, so far as it gives powers of maintaining, altering, repairing, and using the railway, does not appear to be so limited. If these powers of using the railway had not been expressly enacted, they must have been presumed to arise by necessary implication, because the only purpose

(1) 4 B. & Ad. 30.

(2) 5 H. & N. 679; 29 L. J. (Ex.) 247.

for which the railway is built is to carry these engines and carriages. I fully agree, therefore, with the learned judges of the Court of Queen's Bench, that the running of trains, causing the damage in question, is an authorized and legalized use of the railway; and because this is so, I think it is right to construe the clause, if it can be done consistently with the language, in favour of the right to compensation.

The 6th clause, so far as it relates to injurious affections of land, omitting the words as to land taken or used, may be read as follows: "The company shall make to the owners, &c., of lands injuriously affected by the construction of the railway, full compensation for *all* damage sustained by such owners by reason of the exercise, as regards such lands, of the powers by this act, &c., vested in the company." These words, as I have before observed, seem to me to indicate a general intention to give compensation for all injurious affection of land caused by the exercise of the powers of the act, whether occasioned by the structure of the railway, or by the combined operation of the structure and its only use. And I do not think that the words "by the construction of the railway" ought to be construed so to narrow this intention, as to confine the compensation to such injuries only as are due to the building of the railway, or to the mere structure. I do not infer that it was intended, in dealing with this matter, to separate the structure from its immediate and only use. If a strictly literal reading of the clause is resorted to, the plaintiff, in this particular case, even on the narrow construction, would, as it seems to me, be entitled to compensation for all the damage he has really sustained. It is admitted by the company that his house is injuriously affected within the meaning of the act, viz. by the obstruction of light and air caused by the structure of the railway. And this being so, the plaintiff, by the express words of the act, is entitled to compensation for all damages sustained. He would seem to be in the same category as a land-owner, whose land is used or taken, and who is by the same words of the act entitled to, and in practice recovers compensation for all damages, as regards such land, which he has sustained. But I do not wish to found my judgment on this construction of the act. In my view of the statute, the plaintiff would be entitled to compensation for injurious affection by vibration and

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smoke, although his house has not been otherwise injuriously affected.

The authorities which have been cited do not, I think, support the distinction relied on by the company, and some of them may be used in favour of the more liberal interpretation of the statute for which the plaintiff contends. In the case of the *Caledonian Railway Company* v. *Ogilvy* (1), the cause of damage was held not to be actionable at common law, and therefore excluded by the rule established by that decision. The case of *Glover* v. *North Staffordshire Railway Company* (2) was cited for the plaintiff. There a private way was crossed by a line of railway on a level, and gates were put up on either side of it, and keys of them given to the claimant. It was held he was entitled to compensation, on the ground that the acts of the company would, but for the parliamentary powers, have been actionable. There the injury arose not so much from the structure of the railroad as from the use of it with engines and carriages; for if there had been no use, the gates might have been left open, and the way would not have been interfered with. The Court certainly do not draw the distinction now relied on between structure and use. Lord Campbell in his judgment says: "Here depreciation is caused by the erection of the gates, which are obstructions more or less; and I should say also by the liability of danger from the passing of trains." Erle, J., also refers to the danger produced by the passing of the trains in the use of the railway as an injurious affection of the plaintiff's land. On the other hand, some of the observations of the learned judges in the case of *Penny* v. *South Eastern Railway Company* (3), seem to have a contrary tendency; but there the inquisition was clearly bad, because the sum awarded included compensation in respect of damage, viz. the overlooking of the premises, which was clearly not actionable at common law. There was also, no doubt, a claim for vibration, and the Court, or some members of it, appeared to think that compensation might be recovered in respect of the vibration arising during the construction of the railway, but not for the vibration caused subse-

(1) 2 Macq. 229.
(2) 16 Q. B. 912; 20 L. J. (Q.B.) 376.
(3) 7 E. & B. 660; 26 L. J. (Q.B.) 225.

quently. This expression of opinion cannot, however, be taken as a decision on the question, for strictly it was unnecessary to the judgment. If the general power of using the railway, contained in the 16th section, to which I have above adverted, is not confined to the period of construction, there would appear to be no ground for the distinction referred to by the Court; and it certainly seems strange, if it is really so enacted, that a man may have compensation for the annoyance caused by the use of engines during the construction of a railway, and not for a perhaps greater and more noxious use afterwards. The inclination of Mr. Justice Crompton's opinion in that case seems to have been, that for damage caused by vibration compensation was recoverable.

An argument in support of the defendants' construction was founded on the difficulty of assessing compensation, inasmuch as the nuisance would depend on the amount and nature of the traffic, and would fluctuate with it. But, surely, the probable amount of traffic might be estimated, with reference to the district, the direction of the line of railway, and other like circumstances. In many cases of compensation, the estimate must, in a great degree, be based on probable contingencies, and the difficulty is no greater here than that which existed in the case where compensation was given for the injurious affection of land by the gates put up to protect the railway which crossed a private way on a level. There the degree of injury mainly depended on the degree in which the line was used for traffic. Besides, it is, as I understand, admitted that if any part of the plaintiff's land had been taken, he would have been entitled to include in his compensation damages for the present nuisance; and the difficulty in that case would equally have arisen, and must have been solved.

It was further argued that a decision in favour of the plaintiff would admit a multiplicity of other claimants. But it may be remarked that claims can only be made in respect of injurious affection of land, and then only where the injury is of such a nature as would have supported an action for damages if there had been no parliamentary powers. If, however, claims thus limited should happen to be numerous, it would not be a sound reason for refusing just compensation to a man who has sustained injury, and been deprived of his common law right of redress, or for presuming that

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the legislature so intended that others may be subject to the like injustice.

In the result I am of opinion that the plaintiff is entitled to succeed on this special case, and consequently that the judgment of the Court of Queen's Bench ought to be reversed.

Judgment reversed.

Attorneys for plaintiffs: *Aldridge, Bromley, & Thorn.*
Attorneys for defendants: *Elsdale & Byrne.*

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4 H.L. 200

11 Q.B. 338

The following was the judgment which Sir W. Erle had prepared as Chief Justice of the Common Pleas, but which he was prevented from delivering, in consequence of the formal judgment of the Court having been delayed till after his resignation. [See ante, p. 235.]

"The plaintiff brought this action for the amount assessed by a compensation jury for an alleged injurious affection of land within s. 68 of the Lands Clauses Act, 1845; and the question is, whether the facts shew that he was entitled to that compensation. The verdict must be taken to establish that the defendants constructed on their own land a railway within twelve feet from the plaintiff's house, that after it had been completed, the locomotive engines in the ordinary and proper use of a railway, either by noise, or by smoke, or by vibration, or by some of them, lowered the value of the house by the amount of 272*l.* Beyond this, there is nothing to indicate either what was the degree of noise, smoke, or vibration, or what was the amount assessed for either of those causes separately; and there was no evidence of any damage to the realty, either in structure or otherwise, from these causes, so that the compensation must be taken to have been given for the supposed discomfort of the inmates of the house.

It may be observed that this is an imperfect statement of fact on which to raise the important question of law now to be decided; but the procedure, to which alone railway companies can have recourse in order to try liability for compensation, is imperfect, and the defects arising therefrom ought not to prejudice the companies on the trial of their rights. Then, do these facts shew that the plaintiff was entitled to this compensation?

It is clear that the 68th section above mentioned creates no right to compensation; it operates only to provide the procedure to be followed by the parties entitled thereto, leaving the title itself, if any, to be ascertained from the statutes creating it. And accordingly the plaintiff claimed to make his title under the Railways Clauses Act, ss. 6 and 16; and he cannot succeed unless he proves: First, that his land has been injuriously affected within s. 68 above mentioned, and secondly, that this injurious affection arose by reason of the exercise, as regards this land, of the powers vested in the company by the sections 6 and 16 above mentioned.

As to the first point, viz. that the plaintiff's land had been injuriously affected, his counsel relied upon the noise, smoke, and vibration described on the record.

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The quantity of each being undefined as above stated, his argument consisted in suggesting that enormous quantities of each might have been inflicted on the plaintiff, such as might, under some circumstances, be an injurious affection within the section. The answer is, that there is not evidence on this record of such an injurious affection of the plaintiff's land as he described. The burden of proof is on the plaintiff, and the finding of the jury, although it ascertains that there was either some smoke, or noise, or vibration, causing a diminution of value as aforesaid, still does not ascertain that a cause of action was created thereby.

It is clear that injurious affection of land within section 68 means an actionable wrong. Injury means an actionable wrong, and there is no injurious affection under this section, unless there would have been a cause of action if the railway statutes had not passed: see *Caledonian Railway* v. *Ogilvy* (1), and the cases collected in *Ricket* v. *Metropolitan Railway*. (2) Then, is there evidence here of any actionable wrong, supposing the railway statutes to be excluded? I think not. The plaintiff and the defendants are owners of adjoining lands, and the defendants, although a railway company, have the usual rights of property against the adjoining owner. Each owner, as against his neighbour, has a right to cause some noise, smoke, and vibration on his own land, and is not liable to an action if a part of such noise, smoke, and vibration extends to his neighbour's land.

The defendants are not shewn to have violated directly any right of the plaintiff, or to have done any act which was not lawful, taken by itself. As to damage consequential on acts lawful in themselves, damage alone will not sustain the action, it may be damnum absque injuriâ.

The cause of action, if any, lies in the excess of the damage beyond what is considered reasonable, after taking into account the circumstances of time and place, and quantity of annoyance, and the relation of adjoining properties to each other. This cause of action is immersed in undefined uncertainty; there is no standard by which to measure degrees of annoyance, or to estimate the effect of circumstances; each neighbour is a source of some annoyance; proximity necessitates mutual forbearance; the degree of forbearance to be required is measured by the sensibility to feelings of delicacy of the tribunal which has to decide the case, and cannot be foreseen till that decision is given. The maxim, "sic utere tuo ut alienum non lædas," is no help to decision, as it cannot be applied till the decision is made; and the use of the word "nuisance" in the discussion prolongs the dispute, because it means both annoyance that is actionable, and also that which is not actionable; and where the question is, whether an annoyance is actionable, the word nuisance introduces an equivocation which is fatal to any hope of a clear settlement.

The confusion which pervades the reports of *Hole* v. *Barlow* (3), and the cases in sequel thereto (4), relating to the annoyance from the smoke of a brickmaker to the adjoining dwelling-house, is an example, both of the uncertainty of this cause

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(1) 2 Macq. 229.

(2) 5 B. & S. 149; 34 L. J. (Q.B.) 257.

(3) 4 C. B. (N.S.) 334; 27 L. J. (C.P.) 207.

(4) See *Bamford* v. *Turnley*, 3 B. & S. 62; 31 L. J. (Q.B.) 286; *Tipping* v. *St. Helen's Smelting Company*, 4 B. & S. 608; 35 L. J. (Q.B.) 66.

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of action, and of the ill effects of the word "nuisance" upon the discussion. In the present case, the plaintiff had to maintain the same point as the plaintiff maintained in *Hole* v. *Barlow* (1), and his action would lie, if the jury had found that the annoyance from smoke, noise, and vibration, was an excess beyond the degree which they thought reasonable between close neighbours under the surrounding circumstances; but no such question was answered by the jury; and, indeed, could not be, because none such was raised before them, or left to them by the presiding officer. It follows that no cause of action appears on the record, and, consequently, there is no injurious affection within section 68.

It was further argued for the defendants, that the annoyance from noise, smoke, and vibration caused by the trains, even if amounting to the degree required for an action, was not an injurious affection of the *land* within section 68, but an annoyance personal to persons whose feelings suffered therefrom. It is clear, that if trains did run, and by the annoyance from the smoke and noise injured the health of a person standing on the plaintiff's land, the action for such injury would be by him, and not by the plaintiff in respect of his land. But I do not further discuss this point now, as the supposed cause of action in the plaintiff does not appear to me sufficiently defined on this record to enable me to dispose of the case on this ground.

Assuming, however, for the purposes of this judgment, that the plaintiff shews that his land has been injuriously affected to a degree that would sustain an action at common law, we then come to the second question relating to the cause thereof; is it shewn that this injurious affection arose by reason of the exercise, as regards this land, of the powers vested in the company by ss. 6 and 16 of the Railways Clauses Act, under which the plaintiff claims?

The plaintiff contended for an answer in the affirmative; and his main argument seemed to be, that the defendants had been enabled to construct the railway by the exercise of the powers given by those sections; and, if they had not constructed the railway, the company could not have run the trains, and the noise, smoke, and vibration therefrom could not have caused the damage complained of. But in my opinion, upon these facts, the plaintiff shews no title to any compensation, and my reason is, because the alleged damage was consequential upon the lawful use of the railway, with due care and skill, after it had been completed. For such consequential damage I cannot find that any compensation is granted.

It is certain that railway companies may lawfully do some acts under their statutes which would be unlawful without them. In respect of all acts so rendered lawful, the right of action is taken away: *Broadbent* v. *Imperial Gas Company*. (2) In respect of some of such acts, where the right of action is taken away, a title to compensation is created in lieu of such right of action, and thus the important question is raised, what is the limit under the statutes of the title to compensation? And, confining my answer to ss. 6 and 16, which are the only sections on which the plaintiff relies, I say that title to compensation is limited to two classes of cases; the first is under s. 6, where land has been taken, and there is injury caused by such taking, either to the owner of the land

(1) 4 C. B. (N.S.) 334; 27 L. J. (C.P.) 207.
(2) 7 De G. M. & G. 436; 26 L. J. (Ch.) 276.

taken, or to the owner of some adjoining land injuriously affected thereby; the second is under s. 16, where, in the construction of the railway, consequential damage to the actionable degree has been caused to the land by the works, either of constructing or maintaining the railway.

In these two classes of cases, the title to compensation is definite. In the first, it is assumed that there is a wrong done by taking land and obstructing easements. In the second, there are wider words, but the limit is fixed, both in point of time, and also in the class of operations, to damage caused during the time the acts of construction or maintaining are going on: so that after the completion of the railway the company is protected from liability for damage consequential on the proper use of the railway. Beyond these two classes of cases, I do not find any grant of compensation by the two sections here in question; certainly none in respect of the grievance now complained of.

In confirmation of this view, I proceed to an examination of those sections in detail. I would premise that this statute, as well as the Lands Clauses Act, is divided into divisions appropriate to different portions of the subject; and each of these divisions is headed by an appropriate title, and the enactments in each division relate to that heading, and all are to be construed by reference thereto. Both of the sections now in question are in the division of the Railways Clauses Act, headed by these words: "With respect to the construction of the railway, and the works connected therewith;" therefore, all the sections in the division are to be interpreted by this heading, and all either give or regulate powers for such construction. Among them, s. 6 contains powers for taking land for such construction, and s. 16 contains auxiliary powers of interference with ways, waters, and the like, for the same purpose. Section 6 enacts in effect, that in exercising the powers given to the company by the statutes to construct the railway, and to take lands for that purpose, the company shall make to the parties interested in any lands taken or used for the purpose of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands taken or used, and for all damage sustained by such parties by reason of the exercise, as regards such lands, of the powers by the statutes vested in such company. Then, s. 16 enacts in effect, that the company, for the purpose of constructing the railway, and the accommodation works connected therewith, may execute certain specified works, and, among others, alter rivers, drains, and the like, and do all other acts necessary for making, maintaining, altering, or repairing, and using the railway; with a proviso, that in the exercise of the powers granted by their statutes, the company shall make full satisfaction, in manner in the statutes provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers. It thus appears that both these sections are confined in terms to powers for constructing the railway, and do not extend to giving compensation for any user of the railway after construction.

The context confirms this construction. Compensation is secured for every direct violation of a right of property, either in taking the land or obstructing easements, and other such rights appurtenant either to the land taken or to the land injuriously affected by such taking, whether belonging to the same owner or not, and also for all actionable damage caused by exercising the powers given by s. 16 in constructing and maintaining the railway. Furthermore, if damage is caused by using the railway without due care and skill, the party aggrieved obtains indemnity by action at common law. Also, in case of not using proper means

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for consuming smoke, the duty of so doing may be enforced by penalty under the statute (s. 114).

In the comparatively small class of cases where damage is alleged to be caused by some use of the railway, lawful in itself, but becoming unlawful by reason of consequential damage to an adjoining owner, the right of action is taken away and no compensation appears to be given.

It may be that a hardship is thus caused in some individual cases; but the legislature may well have considered that the real interest of all parties was promoted by stopping them from entering on a litigation in its nature peculiarly hazardous and uncertain; the legislature had also good reason to consider the incalculable benefits to every member of the community arising from facility of transport by railway were a good reason for giving security to investments of capital in railways, and protecting that capital from being wasted in litigation in respect of the limited class of doubtful claims above described. Thus the words of the sections and the context lead to the same conclusion. There is compensation for all substantial wrongs, and there is security for the use of the railway.

I have scarcely referred to any of the authorities cited; for none seem cogent. The dicta in *Penny's Case* (1) tend to shew that no compensation is due for damage from vibration, and if so, à fortiori it is not due for noise or smoke. In *Gattke's Case* (2) and *Bradley's Case* (3) the only result was that the Chancellor refused an injunction against vibration, leaving the parties to their remedy at law, if any. Many of the authorities relating to the right to compensation are examined in *Ricket* v. *Metropolitan Railway* (4), and many are well collected by Mr. Manley Smith in his edition of Hodges on Railways, 1866; but none seem to me to be relevant here.

I notice, before concluding, an argument that the trains causing the grievance complained of run in the exercise of the power given by s. 16, relating to the *use* of the railway: but as s. 16 only contains power to execute works for the purpose of constructing and using the railway, I think it cannot be maintained that the actual use of a completed railway is a work for the purpose of using it within s. 16; and I understood that the argument was not relied on by the counsel for the plaintiff.

These reasons lead me to the conclusion that compensation is not given by the statute for damage caused by noise, smoke, and vibration, as stated in the case, and that the plaintiff fails on both grounds."

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(1) 7 E. & B. 660; 26 L. J. (Q.B.) 225. 3 Jur N S 957

(2) 6 Railway Cases, 371.

(3) 6 Railway Cases, 551.

(4) 5 B. & S. 149; 34 L. J. (Q.B.) 257. 11 Jur N S 260

THE GREAT WESTERN RAILWAY COMPANY, APPELLANTS; THE OVERSEERS OF THE PARISH OF BADGWORTH, RESPONDENTS.

1867 *Jan.* 17.

Poor-rate—Railway—Rateable Value—Running Powers—Easement.

Under the provisions of certain acts of parliament, a railway was constructed from G. to C.; half belonged to the G. W. Company, and half to the M. Company; each company had running powers over the half belonging to the other company, but neither company were liable to pay tolls to the other. The M. Company's traffic over the railway was much larger and more profitable than that of the G. W. Company. The G. W. Company being rightly assessed to the poor-rate of B., as sole occupiers of the part of their half of the railway in that parish: the rateable value of this occupation was arrived at by taking the amount of the G. W. Company's profits in the parish, and adding the sum which the M. Company, if they had not had the right of running free, would have had to pay to the G. W. Company, in respect of that part of the railway:—

Held, that this was wrong, and that the rateable value of the G. W. Company's occupation in B. was the amount of their own profits in that parish, enhanced only by the value to them of their right to run free over the M. Company's half of the railway.

CASE stated under 12 & 13 Vict. c. 45, s. 11, on appeal to the Gloucestershire quarter sessions, for the purpose of determining the principle upon which the Great Western Railway Company are liable to be rated to the relief of the poor of Badgworth, in respect of their land and railway within that parish.

1. There is a railway between Cheltenham and Gloucester, hereinafter called "the railway;" it is between six and seven miles long, and passes through part of the parish of Badgworth; it is of a mixed gauge, both broad and narrow, the broad gauge being used by the Great Western Railway Company, and the narrow gauge being used by the Midland Railway Company.

2. This railway was originally part of the line of the Cheltenham and Great Western Union Railway Company, and it was intended that it should have been made by that company, under the authority of certain provisions contained in the 6 Wm. 4, c. lxxvii. At the time when the act passed, it was contemplated that the Cheltenham and Great Western Union Railway would communicate with the Great Western Railway, which was and is a broad gauge line.

3. By section 98, it was in substance enacted that upon pay-

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ment by the Birmingham and Gloucester Company to the Cheltenham and Great Western Union Company of one half of the money expended by them in making the railway, the Cheltenham and Great Western Union Company should be trustees only for the Birmingham and Gloucester Company of that half of the railway lying nearest to Gloucester, and that all powers vested in the Birmingham and Gloucester Company should extend to it as fully as if the Birmingham and Gloucester Company had formed it under the authority of their act.

4. By section 100, it was enacted that the Birmingham and Gloucester Company should have the sole direction and control of the half of the railway lying nearest to Gloucester, and should collect and receive the tolls and profits which should arise or become payable in respect of it.

5. By section 101, after reciting that the railway would communicate with the Birmingham and Gloucester Railway, which last-mentioned railway would communicate with the London and Birmingham Railway, and that the carriages to run and to be used on the Birmingham and Gloucester Railway, would run and be used on the London and Birmingham Railway, it was enacted that the line of railway between the depôts of Cheltenham and Gloucester should be made and formed in such a manner, and with rails of such shape and width as should be convenient and adapted for the use of carriages running on the Birmingham and Gloucester Railway and the London and Birmingham Railway, provided always, that the Cheltenham and Great Western Union Company should, if they should see fit, lay down any additional rails between the depôts aforesaid, for the distinct purposes of their own traffic, all the expenses of which rails, and all extra costs, whether incurred in the purchase of land, the formation of embankments, or otherwise in the construction of that portion of the railway, which might be occasioned by the adoption of such additional rails, should be exclusively borne and paid by the Cheltenham and Great Western Union Company.

6. By section 102, it was enacted that the Birmingham and Gloucester Company should repair the half of the railway lying nearest to Gloucester, including any rails or works connected therewith which were exclusively necessary for the Cheltenham

and Great Western Union Company, and that the last-mentioned company should in like manner repair the half of the railway lying nearest to Cheltenham, including any rails or works connected therewith, which were exclusively necessary for the Birmingham and Gloucester Company; and it was also enacted that each company should have free access to the depôts or stations to be formed at Cheltenham and at Gloucester.

7. The Birmingham and Gloucester Company became, by act of parliament, amalgamated with the Midland Railway Company, and the Cheltenham and Great Western Union Company became also, by act of parliament, amalgamated with the Great Western Railway Company.

8. The railway between Gloucester and Cheltenham was made in accordance with the provisions of the statute, 6 Wm. 4, c. lxxvii. It was formed of a double line, each line consisting of three rails, so as to render the railway suitable for both broad and narrow gauge traffic. The original intention of the legislature was departed from in this, that by arrangement between the two companies, the railway was made by, and, in the first instance, at the cost of, the Birmingham and Gloucester Company, instead of by, and at the cost of, the Cheltenham and Great Western Union Company, but eventually, by means of certain statutes, and by payment by the Great Western Company to the Midland Company of one half of the cost of making the railway, the original scheme was carried into effect.

9. The railway was opened in October, 1847, and from that time to the present both the Midland Company and the Great Western Company have used it, the Midland Company having always used the rails suitable for the narrow gauge, and the Great Western Company have always used the rails suitable for the broad gauge; consequently, out of each line or set of three rails, one rail has been used by one of the companies only, another of the rails has been used by the other company only, and the third rail has been used by both the companies.

10. That portion of the railway which lies within the parish of Badgworth constitutes part of the half of the railway which lies nearest to Cheltenham, and no part of the half of the railway which lies nearest to Gloucester is within the parish of Badgworth.

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11. In September, 1861, both the Midland Company and the Great Western Company were rated for the relief of the poor of the parish of Badgworth, in respect of the part of the railway within that parish. The Midland Company appealed against the rate charged upon them, and contended that, under the circumstances herein stated, they were not liable to be rated to the relief of the poor of the parish of Badgworth in respect of the portion of the railway lying within that parish, and forming part of half of the line nearest to Cheltenham, and the Court of Queen's Bench so held, on a case for their opinion agreed on between the Midland Company and the respondents, reported in 34 L. J. (M.C.) 25.

12. The Midland Company have, ever since the opening of the railway in 1847, wholly and exclusively repaired and maintained the half of the line which lies nearest to Gloucester, and have paid the policemen and other officers employed upon it; and the Great Western Company have wholly and exclusively repaired and maintained the half of the line which lies nearest to Cheltenham, including the part in the parish of Badgworth, and have paid the policemen and other officers employed upon it.

13. The traffic of the Midland Company over the railway greatly exceeds, and is very much more profitable than, the traffic of the Great Western Company over the railway. Neither of the two companies is liable to pay any toll to the other in respect of its use of the half of the railway belonging to the other.

14. All acts of parliament relating to the railway were to be taken and considered as part of this case.

15. After the Court of Queen's Bench had decided that the Midland Company were not liable to be rated to the relief of the poor of the parish of Badgworth, a rate for the relief of the poor of the parish of Badgworth was made upon the appellants by the respondents.

The appellants were rated as the occupiers of "land, tolls, and profits arising from traffic on the railway in the parish of Badgworth, &c.," at a gross value of 1310*l.*, and rateable value of 1048*l.*

The sum of 1310*l.* is made up of two sums of 320*l.* and 990*l.*, and the sum of 1048*l.* is made up of two sums of 256*l.* and 792*l.* The two sums of 320*l.* and 256*l.* are, for the purposes of this

appeal, to be taken as representing respectively the gross value and rateable value in the parish of Badgworth of the land in respect of the tolls earned by the appellants, exclusive of any profits, or other advantage or right arising from the land to the Midland Company; and the two sums of 990*l.* and 792*l.* are, for the purposes of this appeal, to be taken as representing respectively the gross value and rateable value in the parish of the land in respect of the sum which the Midland Company would have to pay to the appellants if they had not the right of running as herein stated.

The question for the Court was, whether the appellants were rightly assessed, and if not, in what manner and upon what principle the appellants ought to be rated.

Manisty, Q.C. (*A. S. Hill* with him), for the respondents. The question is, what is the rateable value of the appellants' occupation in the respondents' parish. The railway in question runs between Cheltenham and Gloucester, one half of it belongs to the appellants, part of which is in the respondents' parish, and the other half to the Midland Company, and each has running powers over the half of the other. The respondents on a former occasion rated both companies in respect of their occupation; but this Court held, in *Midland Railway Company* v. *Badgworth* (1), that the Midland Company had only an easement over the half belonging to the appellants' company, and were therefore not rateable; but the Court entertained the question as to the mode in which the appellants' company ought to be rated, and they said that they were rateable for their half of the railway in respect of the value of the occupation as enhanced by the profits made over it by the Midland Company. The question, therefore, is practically decided.

The Court then called upon

C. Hutton, for the appellants. The question now raised was not involved in the former decision. That case only decided that the Midland Company had no rateable tenement in the respondents' parish. It is admitted that the appellants are solely rateable, and the question is, whether the value of the running powers of

(1) 34 L. J. (M.C.) 25; 11 Jur. N.S. 14.

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the Midland Company is the measure by which the value of the appellants' occupation is enhanced. By a parliamentary contract the Midland Company use the appellants' half of the railway without paying any toll, and it may be taken as if there had been an exchange of easements, and the criterion of rateability then would be, not the value of the Midland Company's tolls, but the value to the appellants of their right to run over the half of the line which belongs to the Midland Company. The respondents, however, have rated the appellants on their profits as carriers over the parish, plus what the Midland Company would have to pay to the appellants, supposing both companies were free. Having regard to the very peculiar arrangements between the two companies, founded on the parliamentary contract, the principle of rating adopted by the respondents is erroneous.

[COCKBURN, C.J. I think that there is considerable difficulty in saying that the appellants are liable to be rated on the amount of the tolls the Midland Company would have to pay them, when in fact they receive no tolls. No doubt, if there were no mutual running powers, but the case were simply that the Midland Company had the right, either by parliamentary enactment or by agreement, of running over the appellants' half of the line, on payment of tolls, and the appellants had a corresponding right of running over the Midland's half of the line, then the amount of tolls received by the appellants would enhance the rateable value of their line, and they would be rateable accordingly; but when the appellants receive no tolls, the only way in which the value of their property is enhanced is by their having an easement over the Midland half of the line.

MELLOR, J. The value to the appellants, who are the occupiers, is not the value of the actual amount of use made by the Midland Company over the appellants' half of the line, but the value to them of the arrangement by which they run free over the Midland half.]

Manisty, Q.C., in reply. The argument of the appellants is answered by the judgment of Cockburn, C.J., in *Midland Railway Company* v. *Overseers of Badgworth.* (1) The Chief Justice says: "The question is, what is the rateable value of that part of the line which the Great Western Company occupy? That may be

(1) 34 L. J. (M.C.) at pp. 28, 29; 11 Jur. (N.S.) 14

easily ascertained by seeing what is the use made of it. It must be conclusively assumed that the Great Western Company have made an arrangement whereby they have, for valuable consideration, given up to the Midland Company their share of the profits to be made on this line. That will not make the profits less an element to be taken into consideration in ascertaining the rateable value." It is upon the principle thus laid down that this rate has been made, and the appellants have been rated on the profits actually resulting from the use of that part of the line which they occupy. The appellants have given up their share of the profit which would have been paid by the Midland Company for the right of running over their half of the line. They do not take the profit in money, but they have an equivalent for it.

[COCKBURN, C.J. In the former case it was not brought to our attention that there was any great disproportion in the earnings of the two companies. I quite agree that, primâ facie, the sessions would be justified in assuming (as we assumed in the previous case), the contrary not having been shewn, that if the Midland Company made certain profits by the easement they had over the appellants' portion of the line, the appellants would make an equivalent amount of profit in running over the Midland portion of the line. But if it be established that more is earned by the Midland Company on this portion of the line than by the appellants on the other portion, then the case assumes a different aspect.]

The question is, what is the actual value of the traffic through the parish? It is immaterial what arrangements the two companies may make between themselves, or whether the arrangement be made by statutory or by private contract. They cannot get rid of their liability to pay on the full value of the traffic. The parish have nothing to do with any arrangements the companies make between themselves.

COCKBURN, C.J. I have already, in the course of the argument, expressed my opinion; and I do not think it is necessary to say more than this: I think the Great Western Company are rateable in respect of this property according to the profit they make of it, plus the increased value by reason of their having the

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right of running, not only over this portion and the rest of their own line, but also over the Midland line. I think it would not be a sound principle to lay down, that the appellants are liable in respect of the profit which the Midland Company make on this portion of the line, unless that profit were no more than equivalent to what the appellants get in exchange for this right of the Midland Company to run over the appellants' portion, viz. the value of the corresponding easement which the appellants have over the Midland line. I think that the sessions would be warranted in assuming that, whatever profit the Midland Company make on this portion of the line, the appellants make the same profit on the corresponding portion of the Midland Railway. But if that primâ facie case is displaced by evidence of the fact that the Midland Company make a great deal more by the line than the appellants, I think the sessions must get at the value in the best way they can. They must ascertain what is the value to the appellants, or what would be the value to any one who came in in their place as a yearly tenant, of this property enhanced by the easement of running over the other half of the line. I do not see any other way in which we can say that the rate ought to be made, having due regard to the Parochial Assessment Act and the decisions upon it.

MELLOR, J. I think if all the consequences which have flowed from the parliamentary arrangement between these two companies had been foreseen, in all probability further provisions would have been made; but one can easily see that, at the time this arrangement was made, it was assumed that the value of the one half of the line would probably be nearly the value of the other, and no very great advantage would accrue to one side or the other; it may be that some new railway may pour its traffic into the appellants' line and run over this portion of it, then no doubt the value of this property in the parish would be enhanced. But primâ facie the parish officers are right in assuming that, this being a line with a certain amount of traffic on it, they are to assess it upon the footing that the value of all that traffic is rateable in their parish, because the occupation in that parish is made profitable by it; but as soon as it is shewn that by some statute the Midland Company,

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who use the line, are to pay no toll, and that the appellants derive no other profit than the right of running trains over the other portion which belongs to the Midland Company, then it appears to me that, on the true principles of rating, which are so far settled, although not easily applicable to the subject matter, we must consider that the appellants' occupation in this parish is rendered so much less valuable by reason that they are not allowed to charge a toll against the Midland Company, but only allowed as an equivalent to run their trains over the other portion of the line. I do not see any reason to doubt that our decision in the former case was right, and our judgment in this case follows from the application of the ordinary principles of the law of rating to the facts before us.

PER CURIAM. The rate must be made on the profits earned by the appellants in the respondents' parish enhanced by the right of the appellants to run free over the half of the railway belonging to the Midland Company.

Judgment accordingly.

Attorneys for appellants: *Young, Maples, & Co.*
Attorneys for respondents: *Hayes, Twisden, Parker, & Co.*

MITCHELL *v.* LEE;
IVEY, GARNISHEE; JONES AND ANOTHER, CLAIMANTS.

Jan. 17.

Debtor and Creditor—Attachment of Debt—Rent—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 61.

9 Q B 286

Rent is a debt which may be attached, under s. 61 of the Common Law Procedure Act, 1854, which enacts that, where judgment has been recovered and is still unsatisfied, and any third person is indebted to the judgment debtor, a judge may order that "all debts owing or accruing" from such third person to the judgment debtor shall be attached to answer the judgment debt.

RULE calling upon John Jones and George Lee, the persons claiming to be entitled to the debt due from one Edmund Ivey to the defendant, which had been attached in favour of the plaintiff by a judge's order, to state the nature and particulars of their claim to such debt, and maintain or relinquish the same; and to

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shew cause why the Court should not make such order thereon, as they might think fit; and also calling upon Ivey to shew cause why the plaintiff should not have execution against him for the debt.

The following facts appeared from the affidavits:—

Judgment was signed in this action on the 12th of September, 1866, for 369*l.* 17*s.* 6*d.* On the 29th of October one Edmund Ivey was indebted to the defendant in the sum of 12*l.* 15*s.* for rent, due for the use and occupation of certain premises of the defendant. On the same day the plaintiff obtained an order nisi, under s. 61 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), attaching the debt due from Ivey to answer the judgment debt. On the 8th of November John Jones and George Lee served Ivey, the garnishee, with a notice, claiming as mortgagees the past and future rent due from him as the occupier of the premises. In consequence of the notice the hearing of the order nisi was adjourned until the 15th of November, when an order was obtained under s. 29 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), calling upon the claimants, the garnishee, and the plaintiff and defendant, to attend before a judge at chambers and state their respective claims.

On the 16th of November the parties attended before the judge who referred the matter to the Court.

It appeared that the claimants were mortgagees under a mortgage made and entered into by the defendant with the claimants' testator, one J. E. Lee, on the 29th of October, 1845, and that the defendant, being mortgagor of the premises occupied by the garnishee, had in 1864, by a written contract made between them, to which the mortgagees were no parties, let the premises to the garnishee, who then became his tenant, and that the rent was due to him under that contract.

Tomlinson, for the claimants. There is a preliminary objection. A debt for rent cannot be attached under the garnishee clauses of the Common Law Procedure Act, 1854. Sections 61—64 (1)

(1) 17 & 18 Vict. c. 125, s. 61. "It shall be lawful for a judge, upon the ex parte application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that

apply to debts which are recoverable only by action, and not to those which can also be enforced by collateral remedies, such as distress, or the like. The landlord can recover rent by a distress; or in the event of an execution issuing against the tenant he would be entitled to be paid one year's rent under 8 Anne, c. 14; or if the tenant died, the rent would be in the nature of a specialty debt. If rent in the hands of the tenant can be attached, then all these rights and remedies would be extinguished or at least suspended, so that they would be lost to the landlord. It was the intention of the legislature to give the judgment creditors the same rights exactly as the judgment debtor had: per Willes, J., in *Newman* v. *Rook* (1); but it was never intended to interfere with the rights of third persons. By analogy to the proceedings in the Lord Mayor's Court by foreign attachment, rent is not liable to be attached: Com. Dig. Attachment (D). As to the main point, whether the claimants as mortgagees are persons having a lien or charge within s. 29 of the Common Law Procedure Act, 1860, it must be admitted that they are not, as there is no privity between them and the tenant.

[LUSH, J. The point has been already decided in *Hickman* v. *Machin*. (2)]

Manisty, Q.C., for the plaintiff. The object the legislature had in passing this enactment was to extend the right of execution. This is a power which did not formerly exist, and is given to the judgment creditor for the purpose of satisfying his judgment. There is therefore no analogy between attachment under the Common Law Procedure Act and the proceedings by foreign attachment in the Lord Mayor's Court. But granting that rent cannot be attached by process of foreign attachment, yet the

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judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that *all debts owing or accruing* from such third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt."

(1) 4 C. B. (N.S.) 435.

(2) 4 H. & N. 716; 28 L. J. (Ex.) 310.

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legislature, with the knowledge of this, have enacted that "all debts owing or accruing from a third person to the judgment debtor shall be attached to answer the judgment debt." Rent when due is a debt; an action will lie for it; and it is within the meaning of the language of s. 61. It may be that some inconvenience may possibly arise from attaching a debt which may be enforced by other remedies besides an action, but the Court has a discretion to allow execution to issue or not, as it thinks fit. Here the garnishee does not appear, and is quite willing to pay; no inconvenience can therefore arise in the present case.

The garnishee did not appear.

COCKBURN, C.J. It may be hard upon the defendant, who is a landlord, that, by attaching the debt in the hands of the garnishee for the benefit of the judgment creditor, he should lose the benefit of those collateral remedies by which he could enforce payment of the rent due from his tenant. I think, however, the language of the statute is so strong that we cannot get over it; if there be a hardship, it is a matter for the consideration of the legislature; we cannot be influenced by it in construing the statute. The words used in the section are "all debts," without any restriction, qualification, or limitation whatever. Rent is clearly a debt, although the landlord has by law certain summary remedies given to him by which he can obtain payment. It may be an inconvenience that a landlord, by the rent due from his tenant being attached, should be prevented from exercising a summary remedy to recover it, but that is no reason why we should put a limitation on the words of the section, which the legislature have not thought fit to put. I understand Mr. Tomlinson to admit that he cannot support the other point.

BLACKBURN, J. I am of the same opinion. Mr. Tomlinson was not able to shew that his clients had any specific lien or claim on these sums of money,—I do not use the word "debt" at present,—and consequently, as far as his clients are concerned, they must be barred. But Mr. Tomlinson raises, as a preliminary question, that proceedings of attachment under s. 61 are not applicable to rent, because, although money owing as rent is a debt in every

sense, yet the judgment debtor has a collateral remedy by distress. It is true that the remedy by distress is not transferred to the judgment creditor, it is suspended, and it is possible that some inconvenience may result from its suspension; but there are many other debts which may be enforced by collateral remedies to which the section applies; for instance, a debt secured by warrant of attorney, if such a debt were attached, the same inconvenience would arise, the person who held the power of attorney could not sign judgment and issue execution or avail himself of the speedy remedy it was intended he should have; because the remedy is suspended while the debt remains attached in the hands of the garnishee. In those cases in which there are collateral remedies some inconvenience might be expected to arise; but during the thirteen years the act has been in force we have never known it arise. I quite agree with my Lord the words of the enactment are express.

MELLOR, J. The words of s. 61 are plain and very large, and include a debt due for rent; I therefore agree that it may be attached in the hands of the garnishee.

LUSH, J. I have come to the same conclusion. I think the words of the statute are too strong to admit of any exception. It is possible that inconvenience may arise from the practice of attaching debts which can be enforced by collateral remedies, but that is no reason why we should put a limitation upon the words of the section. Mr. Manisty's argument, I think, derives additional strength from the fact that under the practice of foreign attachment in the Lord Mayor's Court rent could not be attached, because the legislature, with a knowledge of this practice, in the Common Law Procedure Act uses the words "all debts owing or accruing." The plaintiff is entitled to issue execution against the garnishee.

Rule absolute for execution against the garnishee.

Attorney for plaintiff: *Hodgson.*
Attorneys for claimants: *Dean & Taylor.*

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Feb. 26.

HYAMS *v.* WEBSTER.

Negligence—Highway—Metropolitan Board of Works, liability of, for subsidence in Road—Metropolis Management Acts, 18 & 19 *Vict. c.* 120, *ss.* 110, 111, 135; 25 & 26 *Vict. c.* 102, *s.* 33.

The defendant, under a contract with the Metropolitan Board of Works, opened a public highway, not being a turnpike road, in a metropolitan parish, for the purpose of constructing a sewer; three or four months after the work was finished damage ensued from plaintiff's horse stumbling in a hole in the road. The filling in of the road had been properly done by the defendant, and the hole was owing to the natural subsidence of the materials which sometimes takes place, sooner or later, after such an excavation:—

Held, that the defendant was not liable for the damage; for that, there being no clause in the Metropolitan Management Acts *directly* applicable to such a case, the obligation of the defendant, as between him and the public, ceased as soon as he had properly reinstated the road, it being the duty of the parish authorities to look after the subsequent repairs, whether rendered necessary by subsidence or ordinary wear and tear.

Affirmed Ex. Ch. 4 Q.B. 138.

Declaration, that the defendant was employed as a contractor by the Metropolitan Board of Works to break up and open certain parts of a public highway called St. Mark's Road, Kennington, and afterwards to make good the surface of the highway, and that, having opened it, the defendant did not make good the surface, but wrongfully and negligently permitted and caused divers holes and ruts to remain in the surface, without taking any care or precaution to guard against danger or damage to horses &c. passing along the highway, whereby a horse and cart of the plaintiff, which was driven by the plaintiff's servant, and in which was the plaintiff's wife, was driven into one of the holes, and the horse was thrown down, and the plaintiff's wife thrown out,—concluding with special damage.

The second count alleged that the defendant negligently made and left divers holes and ruts in the said highway, and continued them during the night time without light or signal, whereby &c. as in the first count.

Plea, not guilty, by statute 25 & 26 Vict. c. 102, s. 106.

Issue thereon.

The cause was tried before Cockburn, C.J., at the sittings in London after Hilary Term, 1866, when a verdict was entered for

the plaintiff, with leave to move to enter a nonsuit or verdict for the defendant.

The facts, so far as they were material in the opinion of the Court, and the findings of the jury are given in the judgment of the Court.

A rule was accordingly obtained, on the ground: that the evidence shewed that the defendant was not liable; that the defendant, having properly restored and repaired the part of the highway where the accident occurred, was not liable in respect of subsequent subsidence of the soil; and that the finding of the jury was in substance a finding for the defendant.

Nov. 26, 1866. *Ballantine, Serjt.*, and *Laxton*, shewed cause. The jury have acquitted the defendant of negligence in filling in the road: but their finding as to the parish leaves him liable for the subsequent subsidence. The road must be taken to have been still in his hands, and this subsequent subsidence was proved to take place very usually, and it was therefore the defendant's duty to observe and fill in from time to time any holes that occurred, or guard them in the meantime; and he was therefore liable for the consequence of his negligence in not having done so.

M. Chambers, Q.C., in support of the rule. The contractor for the present purpose is in the same position as the Board of Works. And no doubt a public body with statutable powers may be liable for negligence of themselves or those whom they employ in the performance of or for the omission of a duty: *Mersey Docks Trustees* v. *Penhallow* (1); *Coe* v. *Wise*. (2) But here there was no negligence or omission. By 18 & 19 Vict. c. 120, s. 135, the Board of Works are impowered to construct sewers; by ss. 110 and 111 the duty is imposed on persons breaking up the streets of properly reinstating the roadway and guarding the excavation while the work is going on: in the present case the work was properly finished; and there is no clause in that statate, or in 25 & 26 Vict. c. 102, which imposes on the person or body opening the road the duty of maintaining the road for any time after it has been reinstated.

(1) Law Rep. 1 H. L. 93. (2) Law Rep. 1 Q. B. 711.

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[MELLOR, J., referred to *Gray* v. *Pullen*. (1)]

In that case there had been neglect in not filling in the trench properly: so also in *Clothier* v. *Webster* (2) there was negligence in doing the work authorized by the statute. In the present case the jury found that the trench was properly filled up; and their second finding, that the parish had not taken to the road, is immaterial; the parish is bound to take to and look after the state of the highways, unless there is some enactment releasing them from liability, and here there is none. In 3 Burn's Just. tit. Highways, p. 518, it is laid down, that the parish is primarily liable for the non-repair of a highway in all cases, notwithstanding the duty of repairing may be imposed on some other person or body, citing *Rex* v. *St. George, Hanover Square* (3); *Rex* v. *Oxfordshire* (4); and per cur. in *Bussey* v. *Storey*. (5)

[LUSH, J. Although the parish may be liable, the contractor may be liable too.]

No doubt: but quoad the public, the defendant had no duty beyond that of properly filling in the road, which duty he had performed months before the accident.

Cur. adv. vult.

Feb. 26. The judgment of the Court (Cockburn, C.J., Mellor and Lush, JJ.) was delivered by

LUSH, J. This is an action to recover compensation for an injury arising from the fall of a horse in St. Mark's Road, Kennington, along which the plaintiff's wife was driving.

The road had formerly been, but had ceased to be, a turnpike road. At this particular spot the materials had sunk, leaving a hole in the road, which caused the horse to stumble and fall.

The defendant, who was a contractor, had, under a contract with the Metropolitan Board of Works, opened the road for the purpose of constructing a sewer. The work had been done in lengths of twenty feet at a time. The part of the road in which the accident happened had been finished and covered in in the summer of

(1) 34 L.J. (Q.B.) 265; 5 B. & S. 970.
(2) 31 L. J. (C.P.) 316; 12 C. B. (N.S.) 790.
(3) 3 Camp. 222.
(4) 4 B. & C. 194.
(5) 4 B. & Ad. at p. 109.

1864, and the whole sewer completed in the October following. The accident happened in February, 1865.

It appeared in evidence that a subsidence to a greater or less degree sometimes takes place, sooner or later, after an excavation of this description has been made, however well the cutting might have been filled in; and it was contended that the defendant ought to have anticipated such a consequence, and to have watched and repaired the defect from time to time, until the road had become as firm and compact as it was before the cutting was made.

The Lord Chief Justice left to the jury, first, whether the hole was the consequence of the work executed by the defendant, through a defect in the filling in, or through a subsidence arising from natural causes; and secondly, whether the parish had taken to the road so as to relieve the contractor from any obligation to look after the work and make good its defects. The jury found that the hole was occasioned by natural subsidence,—thus negativing negligence in the filling in; and that the parish had not taken to the road; and they assessed the damages at 40*l*. A verdict was thereupon entered for the plaintiff, leave being reserved to the defendant to enter a nonsuit.

The question which has been argued before us is, whether the defendant, as the person who opened the road, was bound to do from time to time such repairs as became necessary in consequence of the natural subsidence of the soil which he had put in, or whether his duty ceased as soon as he had properly filled in the trench, and made that part of the road as sound and compact as it could then be made.

We are of opinion that the obligation of the defendant, as between him and the public, ceased as soon as he had properly reinstated the road, and that it was the duty of the parish authorities to look after its subsequent repairs, whether its defective condition arose from subsidence or from ordinary wear and tear.

There is no clause in the Metropolis Local Management Acts which directly applies to such a case as this, but there are two sections which appear to have an important bearing upon it.

The 33rd section of the 25 & 26 Vict. c. 102, enacts "that the Metropolitan Board, and any vestry or district board, may, where necessary for the purpose of executing any work authorized by the

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recited acts or this act, open and break up any *turnpike* road, under and subject to the restrictions and provisions hereinafter contained;" and after prescribing notice to the trustees, and the mode in which the work shall be done, so as not to stop the traffic, it proceeds: "and the party doing the work shall restore every road so opened or broken up to its original state, as to surface and materials; and in order to meet the future expenses consequent on the subsidence of materials newly filled in, shall pay to such commissioners or trustees on demand such sum as they shall require for such purpose, not exceeding one shilling for every superficial square yard; and, so far as the works affect the same, shall make good all drainage, paving of water channels, kerbs, or footpaths, and other matter and things connected with the maintenance of the road, and in default the surveyor may cause the necessary work to be done; and in all cases of expense incurred by any such surveyor, on the default of the party doing the works, such party shall pay such expense to the commissioners or trustees on demand." And by the 111th section of the original act (18 & 19 Vict. c. 120) it is enacted, "that if any company or person authorized to break up or open any pavement or surface of any street for the purpose of laying, altering, or repairing any gas, water, or other pipe, or other lawful cause, do not, with due diligence, cause the ground to be filled in, and the pavement to be reinstated, and the surface to be made good, in a proper and substantial manner, . . . every such company or person so offending shall, for every such offence, forfeit a sum not exceeding 5*l.*, and also a further sum, not exceeding 40*s.*, for every day during which such offence continues; and no such pavement shall be considered to have been reinstated in a proper and substantial manner by any such company or other person, unless the same have been reinstated with the same or similar materials of the like quality and thickness, and cemented and bound together in the same or an equally substantial manner, as those of which it was composed, in such manner as is satisfactory to the vestry or board."

These sections appear to us to indicate the true measure of duty which the board or its contractors undertake towards the public, when exercising the powers given them of excavating a public highway for public purposes. It could not reasonably be

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contended that their obligation should be more extensive than that of a gas or water company, or larger when laying down a sewer in a road not a turnpike road, than when using a turnpike road.

We are therefore of opinion that the rule to enter a nonsuit should be made absolute.

Rule absolute.

Attorney for plaintiff: *Henry Levy.*
Attorney for defendant: *J. T. Moss.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 2.

LLOYD *v.* JACKSON AND OTHERS.

Will—Devise without words of inheritance, when it gives an estate in fee—Introductory words, "as touching such worldly estate wherewith it hath pleased God to bless me"—Words, "freely to be possessed and enjoyed"; "all my children to be educated and settled in business according to my wife's discretion."

A testator, by will made before the Wills Act, devised thus:—"As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and bequeath to my wife, whom I likewise constitute my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, together with all my houses and household goods, deeds, and moveable effects; all my children to be educated and settled in business according to my wife's discretion":—

Held, affirming the judgment of the Court of Queen's Bench, that the last clause indicated an intention that the wife should take such an estate as would enable her to carry out the wishes of the testator, and that she therefore took an estate in fee, and not merely a life estate.

APPEAL from the decision of the Court of Queen's Bench making absolute a rule to enter a verdict for the defendants. (1)

An action of ejectment was brought to recover possession of premises situate in the parish of Fishguard, in the county of Pembroke.

Samuel Lloyd and Thomas Lloyd, two of the defendants, appeared to the writ, and defended for the whole of the premises.

The cause was tried before Blackburn, J., at the Pembrokeshire spring assizes, 1866, when it appeared that the plaintiff claimed to be entitled, as heir-at-law of his father, Ebenezer Lloyd; and

(1) See the report of the case in the court below: Law Rep. 1 Q. B. 571.

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the defendants were also sons of Ebenezer Lloyd, and claimed under the will of their mother, Mary Ann Lloyd, who they alleged took an estate in fee simple under Ebenezer Lloyd's will. Ebenezer Lloyd, the testator, died seised of the lands, messuages, tenements, and hereditaments, mentioned in the writ of ejectment, for an estate in fee simple in possession; having made his last will and testament in writing, dated the 9th of June, 1809, as follows:—

"In the name of God, Amen. I, Ebenezer Lloyd, of the parish of Fishguard, in the county of Pembroke, being of perfect mind and memory, do make and ordain this my last will and testament; —that is to say, ... as touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and bequeath to my well-beloved wife, Mary Ann Lloyd, whom I likewise constitute, make, and ordain, my sole executrix of my last will and testament, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, together with all my houses and household goods, deeds, and moveable effects; all my children to be educated and settled in business according to my wife's discretion."

The will contained a clause revoking all other wills, and was duly executed and attested.

Ebenezer Lloyd died on the 12th of September, 1813, and his will was duly proved by Mary Ann Lloyd, his widow and executrix. Mary Ann Lloyd, on the death of the testator, Ebenezer Lloyd, entered into possession of all his property described in the writ of ejectment, and continued in such possession until her death on the 14th of March, 1865.

A verdict was directed for the plaintiff as to certain of the lands, leave being reserved to the defendants to move to set aside the verdict, and enter it for the defendants.

A rule having been obtained accordingly, on the ground that the devise to M. A. Lloyd carried the fee, the Court of Queen's Bench made the rule absolute. (1)

Mellish, Q.C. (*H. S. Giffard, Q.C.*, and *J. W. Bowen* with him), for the plaintiff. The question is, whether the testator has thrown a burden on his widow which enlarges the life estate she takes

(1) See Law Rep. 1 Q. B. 571.

under the will into an estate in fee. The law is correctly stated by Wood, V.C., in *Burton* v. *Powers*. (1) The result of the authorities, as laid down in the House of Lords in *Moor* v. *Denn* (2), is, that where land is devised, and a burden is thrown upon the devisee, the fee must necessarily pass, because the devisee's interest may cease before he is repaid out of the estate, if it is only an estate for life. So in the case of an annuity, where the annuitant may outlive the devisee, the fee passes, the interest being measured by the possible amount of the charge. But there is another class of cases, in which the devisee takes nothing until the payment is made, where the charge is independent of his interest, and affects the property whether in his hands or in the hands of the remainderman, making it immaterial what interest he takes in the property. Here the charge is not only to educate the children, but to settle them in business; the charge is on the estate, and it is not a personal charge on the testator's widow; it is a matter which might not happen until some time after her death; and the intention of the testator was, that the children should be educated and settled in life out of the estate. *Foley* v. *Parry* (3) shews that the words amount to a devise to the children of funds necessary to their education; they would therefore have a remedy against all persons into whose hands the estate should come. There is no reason why the estate for life should be enlarged into an estate in fee.

Joshua Williams, Q.C. (*H. G. Allen* and *C. E. Coleridge* with him), for the defendants, was not called upon.

KELLY, C.B. In this case we have to determine whether the devisee, who was the testator's widow, took under the devise in question an estate for life or an estate in fee. The principles of law applicable to the construction of a devise of this nature have been correctly stated in the argument. In considering the terms of this devise we must see whether there is not within the four corners of the will language which compels us to determine the case in favour of the devisee, and to hold that she took an estate in fee, and not merely an estate for life. Now the language of the

(1) 26 L. J. (Ch.) 330. (2) 2 B. & P. at p. 250.
(3) 5 Sim. 138; 2 My. & K. 138.

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will, as far as it is material to the present case, after reciting much that it is quite unnecessary to refer to, proceeds: "and as touching, &c." [The Lord Chief Baron read the devise.]

That clause appears to be all that is important, and there is nothing in the rest of the will which qualifies or throws any light upon the expressions contained in this portion of it.

Now, with regard to the words, "and as touching such worldly estate wherewith it hath pleased God to bless me in this life," whatever we may think the real natural import of those words, it is conclusively settled that, although they undoubtedly purport to dispose of, and therefore to shew that the testator intended to dispose of, the whole of his worldly estate, they have not that effect in law, and standing alone there can be no doubt that they devise the real estate for life only; but the devise proceeds: "I give and bequeath to my well-beloved wife, whom I likewise constitute my sole executrix of my last will and testament,"—the circumstance of her being made executrix leaves the question very much where it was, but the will proceeds: "all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed." Now it has been held, and more than once, that a devise of "all and singular my lands, messuages, and tenements," is not descriptive of the quality of estate; it does not naturally carry the fee, and it may have the effect of conferring only an estate for life; and *that*, notwithstanding the very large words that follow in this will, and which are to be found also in other wills which have come under the consideration of courts of law, "freely to be possessed and enjoyed." I am not therefore prepared to say that a devise of all the worldly estate of the testator, or rather a devise introduced by a declaration of an intention to dispose of all his worldly estate, nor even followed by a devise in terms of all and singular his land, messuages, and tenements, by the devisee to be freely possessed and enjoyed, would, if standing alone, have amounted to a devise in fee; nor even with the words which follow, "together with all my house and household goods, deeds, and moveable effects," though it is really difficult to say that, if a case can be imagined in which the maxim "juncta juvant" might reasonably, fairly, and justly be made applicable to the terms of a will, this is not that case.

It is, however, unnecessary in the present case that we should determine whether all these phrases which I have mentioned, put together, would be sufficient to carry the fee to this devisee, because those words are followed by others which, in our opinion, leave no reasonable doubt upon the question. After the devise to which I have already called attention, the will proceeds, "all my children to be educated and settled in business, according to my wife's discretion." It is contended that where a devise of this nature effects merely a charge upon the estate, it creates a trust, and a trustee may execute a trust without taking under the general devise a fee simple in the property, or any larger estate than an estate for life. But if we consider that principle as applicable to the present case, the words certainly do not in direct terms charge the education of the children, and settling them in business upon the estate at all; there is no direct and express reference to the estate or the property in this part of the will. But the language, which must be taken together, and upon which we must put a reasonable and natural interpretation is, "all my children to be educated and settled in business according to my wife's discretion." This seems to us, in effect, to be equivalent to a devise in these terms, "I direct my wife to take upon herself the education and settlement in business of my children; she is the person who is to educate all my children, and settle them in business, but she is to do so according to her discretion." That is the duty which is particularly and distinctly imposed upon the wife, and upon the principle of the authorities which have been cited, the effect of such words is,—where a devisee has a duty imposed upon him to execute a certain trust at his own cost, so that he may immediately become chargeable with a debt, or have to expend money which he cannot repay himself without having a grant or devise of the fee simple in the estate,—to give him a fee simple in the estate, in order to enable him to reimburse himself the expenditure which he may have incurred.

Reading these words as a devise in general terms, which may therefore be either of an estate for life or in fee, but with a direction which is imperative upon the wife to take upon herself the education of all the children and the settling them in business, we are of opinion that this case comes within the principle of the latter

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class of cases, and that it operates as creating an obligation on the part of the wife to incur the necessary expenditure for educating the children, and for settling them in business, and consequently shews the intention of the testator to confer upon her by this devise an estate sufficient to enable her, whether she shall live or die, to avoid any personal loss in the execution of the directions of the will. But it is of no importance whether these words are obligatory or not: because, even supposing that the discharge of this duty is altogether discretionary, that the providing education for the children and settling them in business are to be altogether at the free will and discretion of the wife, that does not alter the effect of this devise, as manifesting the intention of the testator; for it must be presumed that he took it for granted that his wish or request thus expressed would be complied with, and it must therefore also be taken for granted that he intended to confer upon his wife, the devisee, an estate which would indemnify her against all loss in the event of her taking upon herself the expense. In either case, therefore, whether this duty be obligatory, or whether it be discretionary, we are of opinion that the effect of this part of the will is to confer the fee simple, and not merely an estate for life.

The judgment of the Court of Queen's Bench is therefore affirmed.

WILLES, KEATING, and MONTAGUE SMITH, JJ., BRAMWELL, CHANNELL, and PIGOTT, BB., concurred.

Judgment affirmed.

Attorney for plaintiff: *T. H. Smith.*

Attorneys for defendants: *Eyre & Lawson.*

OGLE *v.* EARL VANE.

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Feb. 11.

Damages, measure of, for non-delivery of Goods under Contract of Sale—Forbearance of Buyer at Seller's request—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17.

The defendant by bought and sold notes contracted to sell to the plaintiff 500 tons of iron, delivery to extend to the 25th of July. The defendant delivered none of the iron by that date, nor up to the February following, when the plaintiff went into the market; and, the price having risen since July, he sought to recover from the defendant, as damages for his breach of the contract of sale, the difference between the contract price and the market price in February. There was parol evidence from which the jury might infer that the plaintiff's delay was at the defendant's request. The jury having returned a verdict for the full amount claimed:—

Held, that the evidence went to shew, not a new contract, but simply a voluntary forbearance by the plaintiff at the request of the defendant, that the Statute of Frauds, therefore, did not apply, and the plaintiff was entitled to a verdict for the full measure of damages.

Affirmed in Ex. Ch. 36 B. 272.

DECLARATION, that the defendant had made three contracts to sell to the plaintiff certain iron, to be delivered at certain dates (setting out the terms of three bought and sold notes), that the iron was not delivered at the dates specified, claiming damages for the non-delivery.

Plea, payment of 100*l.* into court.

Replication, damages ultra.

Issue thereon.

At the trial before Martin, B., at the summer assizes, 1866, at Manchester, it appeared that Messrs. Lockhart, Tozer, & Co., brokers, of Manchester, made in April, 1865, three contracts by bought and sold notes, signed by them as agents on behalf of the plaintiff and defendant respectively, by which the plaintiff, a metal broker at Manchester, bought of the defendant, the proprietor of ironworks at Seaham, 500 tons of iron.

The first note was:

"April 18, 1865.

Sold R. Ogle, Esq., of Manchester, per account of Earl Vane, 200 tons No. 3 Vane and Seaham pig iron at 57*s.* per ton, less 2½ per cent. for cash; monthly payments; delivery equal to Manchester, and to extend over present quarter."

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The second, dated April 22, was precisely similar, for 200 tons; and the third, dated April 25th, also similar, for 100 tons, but the delivery was "to extend over three months."

None of the iron was delivered by the 25th of July, 1865. A correspondence was put in evidence between Messrs. Lockhart, Tozer, & Co., Mr. Shaw (the defendant's agent and manager at the ironworks), and the plaintiff, of which the following letters are the most material:—

Lockhart, Tozer, & Co., to Shaw. "August 5, 1865.

If Messrs. Bayley & Co. can arrange with their customers to take No. 4 foundry iron in place of No. 3 at 1*s.* per ton less than their contract, shall I agree with them to furnish it, and can I do the same with Ogle? With the latter I have as yet said but little, as he has been out of town, and only returned a day or two since."

Shaw to Lockhart, Tozer, & Co. "August 7, 1865.

In reply to your favour of the 5th inst., I beg to inform you that, having No. 4 foundry on hand, I am willing to let Messrs. Bayley and Ogle have it at 1*s.* per ton less than the price offered for No. 3, being most desirous of accommodating our customers as far as lies in my power; but please to remember that I do not hold Earl Vane liable to deliver in consequence of the accident to the furnaces until they are repaired."

Plaintiff to Shaw. "August 10, 1865.

As I have informed Messrs. Lockhart, Tozer, & Co., some of my constituents to whom I have sold the 500 tons No. 3 V. and S. which I purchased from you are pressing for deliveries. Mr. Tozer informs me that you cannot deliver any No. 3 for some time to come, and that you have only No. 4 foundry in stock. If I could persuade some of my friends to take No. 4 in lieu of 3, what allowance would you make per ton? I don't consider that less than 2*s.* would be any inducement to them to use it, as most founders have a decided objection to No. 4 North of England iron. Awaiting the favour of your reply in course."

Shaw to Plaintiff. "August 11, 1865.

In reply to your note of the 10th inst., I can let you have foundry 4 at 46*s.* per ton, in lieu of No. 3, but if you require No. 3 I fear

you will have to wait until the furnaces are repaired and flued in, which will be some time."

Lockhart, Tozer, & Co., to Shaw. "October 14, 1865.

Some time since we sent an order for some iron No. 3 for R. Ogle, and at same time for Bellhouse & Co. The latter has been received, but we have heard nothing of the former. Mr. Ogle is most anxious for delivery. Will you please advise us if it is off, or any portion thereof."

Shaw to Lockhart, Tozer, & Co. "October 16, 1865.

In reply to your favour of the 14th inst., I have no No. 3 in stock."

Lockhart, Tozer, & Co., to Shaw. "October 25, 1865.

Will you transfer balance of Bayley & Co.'s contract, as per accompanying note? We understand from Bayley the delivery is not guaranteed for two to three months at least."

Shaw to Lockhart, Tozer, & Co. "October 26, 1865.

In reply to your note of the 25th inst., I am unable to say when I can send away iron from the furnaces."

Lockhart, Tozer, & Co., to Shaw. "December 16, 1865.

We enclose two letters received this week from parties holding contracts for Vane and Seaham pig iron; will you please advise us on the subject, as we cannot any longer make them wait for the iron."

Lockhart, Tozer, & Co., to Shaw. "January 18, 1866.

We enclose letter sent us this morning by Mr. Ogle's solicitors. Will you please advise us immediately what course you wish us to pursue, as we expect Hall & Pickles will pursue the same course."

Shaw to Lockhart, Tozer, & Co. "January 19, 1866.

Your favour of the 18th inst., enclosing letter from Messrs. Slater & Barling [plaintiff's solicitors], came duly to hand, and in reply I can only say that, as the blast furnaces suddenly gave way, and were not blown out, and no iron having been made since, it is a casualty all buyers are subject to."

Lockhart, Tozer, & Co., to Shaw. "February 9, 1866.

We are sorry to again trouble you, but we cannot help, as we

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have put off and put off our customers till now they seem determined to bring matters to a focus. We wrote you on Monday, with copy of letter from Mr. Ogle's attorneys. We now enclose another from that firm, and ask your attention to it. Mr. Hall, of Hall & Pickles, has given us notice that he shall commence to suit himself unless you make the best efforts to get the furnaces in blast or to give him other iron. Bellhouse & Bayley are also threatening us."

Shaw to Lockhart, Tozer, & Co. "February 10, 1866.

Your favours of the 6th and 9th instant came duly to hand. I should like to have a copy of the contracts entered into with the different gentlemen, as I am aware in more instances than one when they were not fulfilled to the time we had no redress."

Tozer for Lockhart, Tozer, & Co. to Shaw. "Feb. 13, 1866.

Yours received during my absence from home. I enclose copy of the sale note as furnished Ogle and others. I have also received another communication this morning from Dallam Forge Company. They will not wait any longer for their iron, but say they shall buy and charge you the difference."

The plaintiff bought in the market early in February, 1866 (the price being then much higher than in the previous July), and commenced his action on the 8th of February; and he claimed as damages 237*l.* 10*s.*, the difference between the market price in February, 66*s.* 6*d.* per ton, and the contract price, 57*s.*, on the 500 tons of iron of the quality contracted for.

The defendant's counsel submitted that there was no legal evidence to go to the jury to shew that the plaintiff was entitled to more damages than the difference between the contract price and the market price at the end of July, 1865, when the contracts were broken; and it was agreed that the 100*l.* paid into court was sufficient to cover this.

16 C. B. 158

The learned judge reserved the point; and told the jury: That there was no other contract but the original bought and sold notes. When the time comes to complete a contract to supply goods and the vendor says "I cannot deliver," the damages are the difference between the market price when the contract is broken and the

contract price. But if the vendor holds out that he will be able to deliver at some future time, and the vendee waits accordingly, there is no fresh contract, but the circumstance may be taken into consideration in ascertaining the damages, when the vendee goes into the market on the vendor turning out unable after all to deliver the goods. The learned judge then pointed out the relative position of the several parties, and left it to the jury to say whether, on the evidence, they thought that Shaw, acting for the defendant, had held out that he should be able to deliver the iron, and that the plaintiff had waited accordingly, in which case they might give the plaintiff a verdict for such damages as they thought him entitled to beyond the 100*l.* paid into court.

The jury returned a verdict for 137*l.* 10*s.*, the balance of the sum claimed, leave being reserved to move to enter it for the defendant, if the Court should be of opinion that there was no evidence to go to the jury of the plaintiff being entitled to more damages than the sum paid into court.

A rule having been obtained accordingly,

Holker shewed cause. The correspondence shews that Messrs. Lockhart acting for the plaintiff, had consented to hold their hands at the implied request of Shaw, who was undoubtedly the agent of the defendant, on his holding out that he should be able to supply the iron in the course of a few months. If so, the plaintiff was entitled, on the defendant ultimately turning out, in February, unable to supply the iron, to go into the market and purchase at the then price, and claim the difference against the defendant.

Liddell, Q.C., and *T. Jones, Q.C.*, in support of the rule. The plaintiff is seeking to enforce the original contracts which were broken at the end of July; the measure of damages was then fixed; and nothing subsequent can alter this, except something which amounts to a fresh contract between the parties, and then, as this was not in writing, the Statute of Frauds (29 Car. 2, c. 3, s. 17) intervenes and prevents the contract being valid. No doubt *Warren* v. *Stagg*, tried before Buller, J., cited in *Littler* v. *Holland* (1), and

(1) 3 T. R. at p. 591.

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Cuff v. *Penn* (1), would be in the plaintiff's favour, as establishing that after a variation by parol in the time for delivery under a written contract, the contract so altered may be enforced notwithstanding the Statute of Frauds; but those cases are overruled by *Stead* v. *Dawber* (2), followed by *Marshall* v. *Lynn.* (3) In the latter case Parke, B., says: "If it had not been for the decision in the case of *Stead* v. *Dawber* (2) I should have wished to hear the argument on the other side, and probably to have taken time to consider; but as the case of *Cuff* v. *Penn* (1), which had before been very much doubted, appears to have been overruled by *Stead* v. *Dawber* (2), we do not think it necessary to do so. Here there was an original contract in writing to send these goods by the first vessel; an alteration as to the time of delivery was subsequently made by parol; and the point to be decided is, whether such an alteration by parol of the written contract can be binding. It appears to me that it cannot; and that the same rule must prevail as to the construction of the 17th section of the Statute of Frauds, which has already prevailed as to the construction of the 4th section." And then the learned judge proceeds to shew that *Goss* v. *Lord Nugent* (4) clearly established that if a contract as to the sale of an interest in land is varied by parol, the new contract cannot be enforced. There can be no distinction whether the variation of a written contract be before or after breach. Possibly a new parol contract in substitution of the old, founded on the consideration of not enforcing the old, might be sustained, as was held in *Nash* v. *Armstrong* (5); but the contract here is within the Statute of Frauds. Assuming the evidence shews any contract at all, it is partly by parol, and it cannot affect the original contract: *Noble* v. *Ward.* (6) The letters of Lockhart & Tozer were not evidence against the defendant; they were not shewn to be the defendant's agents beyond making the original contract.

[BLACKBURN, J. They may be made evidence by the answers of Shaw, who is admittedly the defendant's agent, and the cor-

(1) 1 M. & S. 21.
(2) 10 Ad. & E. 57.
(3) 6 M. & W. 109, 116.
(4) 5 B. & Ad. 58.
(5) 10 C. B. (N. S.) 259; 30 L. J. (C. P.) 286, Jan. Th. S. 1860
(6) Law Rep. 1 Ex. 117; Law Rep. 2 Ex. 135. Jan. Th. S. 1867.

respondence, particularly the two letters of the 9th and 10th of February, may well be understood as implying that the postponement by the plaintiff was at Shaw's, that is, the defendant's request.]

BLACKBURN, J. I am of opinion, notwithstanding the arguments and cases cited, that there was ample evidence to justify the verdict for the larger amount of damages. In actions for the non-delivery of goods pursuant to contract of sale, ordinarily the measure of damages is the difference between the market price and the contract price, the question being what amount of money will put the plaintiff in the same position as if the defendant had completed his contract; and this amount is well settled to be the difference between the contract price of the goods and the market value of the goods at the time the contract is broken. In the present case, there were three contracts in writing, which may be treated as substantially one, that the 500 tons of iron should be delivered by the end of July. None of it was delivered at that time; and the plaintiff, as he alleges, at the request of the defendant, waited till February, when he lost all patience and went into the market, and brought this action; and the damages were assessed at the market price in February, which was much higher than at the end of July. The argument of the defendant's counsel was that, inasmuch as the contract was broken at the end of July, the damages were fixed at the time of the breach, and nothing could alter the amount of damages, except something which would constitute a new contract; and that this new contract, not being in writing, would, in accordance with the cases cited, *Stead* v. *Dawber* (1), and *Marshall* v. *Lynn* (2), be void under the Statute of Frauds. I do not think that is the proper view of the present case. There is no evidence that the plaintiff ever bound himself to wait for a later delivery, or that he ever made a fresh contract. And I do not think that the evidence establishes either of Mr. Jones's propositions, that what the plaintiff did was either inoperative altogether, or amounted to a contract which was void under the Statute of Frauds. I agree that the plaintiff did not make a binding contract at law, because he never contracted at all; but I think that what

(1) 10 Ad. & E. 57. (2) 6 M. & W. 109.

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he did operated so far that it amounted to a postponement of the day at which he might go into the market, and at which the jury might calculate the measure of damages.

Looking at the whole of the evidence, I think that the fair conclusion is, that the plaintiff and the other parties finding that the defendant could not deliver the iron by the appointed time, and at first, perhaps, thinking the accident to the furnaces a good legal excuse, yet afterwards treating it only as a good mercantile reason for not being hard on the defendant, naturally considered the defendant entitled to consideration. That, I think, is the fair conclusion to draw from the correspondence, that Mr. Shaw intimated that it was not convenient to deliver immediately; and the plaintiff, instead of insisting on his strict rights, consented to treat the defendant leniently, and said, "I'll wait, but I do not bind myself to wait." This distinction between waiting and not binding one's self to wait, is the same as that between a mere licence and a contract; or as that between giving time to a principal by mere forbearance, and binding one's self for a good consideration to give time, in which latter case only is the surety released. The question in such cases being, "Have you ever bound yourself?" In *Stead* v. *Dawber* (1), the Court evidently thought this distinction important. That was an action for non-delivery of a cargo of bones, which were by the written contract to be shipped on the 20th to the 22nd of May, and to be paid for by an acceptance at three months from the delivery; and the 22nd happening to be Sunday, in a conversation between the defendant and the plaintiff's agent, at the suggestion of the defendant, the Monday or Tuesday following was substituted; and the agent who proved this, also stated that the acceptance would also be proportionally enlarged. The Court say the main question was whether the enlargement of this time was an alteration of the contract, or only a dispensation with its performance at the time. And after noticing the cases of *Cuff* v. *Penn* (2), and *Goss* v. *Lord Nugent* (3), as apparently contradictory, the Court proceed to say: "But it seems to us that we are mainly called upon to decide a question of fact; what, namely, was the

(1) 10 Ad. & E. at pp. 64–5.

(2) 1 M. & S. 21.

(3) 5 B. & Ad. 58.

intention of the parties in the arrangement come to for substituting the 24th for the 22nd as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects, except those of the day of delivery and date of the accepted bill, with the old one?" And the Court came to the conclusion—and I do not think they could well have come to any other—that though the variation was so slight, it did amount to a complete, new, and substituted contract for a delivery on the 24th instead of the 22nd. In *Marshall* v. *Lynn* (1), there was more of a change in the contract. In that case, the defendant agreed in writing to buy certain potatoes of the plaintiff, to be shipped on board a certain vessel on her next arrival at Wisbeach; but on her next arrival, the defendant asked the plaintiff to allow the vessel to go an intermediate voyage; and the plaintiff agreed to this, which was clearly substituting one contract for another. Here there was no substitution of one contract for another. Here the inference which I think the jury might well draw as the result of the evidence, is that the parties did no more than this: The plaintiff was willing to wait, at the request of the defendant, for the defendant's convenience, and he did wait a long time, till February; but if he had lost patience sooner, and refused to wait any longer, he would have had a right to bring his action at once for the breach in July. It is clearly a case of voluntary waiting, and not of alteration in the contract; and the length of time can make no difference. As to the evidence, I am inclined to think that the brokers continued throughout to act as agents for both parties, and, consequently, that the letters written by them might contain statements binding on the defendant; but this is really immaterial, as there are letters written to Shaw (who is admittedly the defendant's agent), containing statements which are, in effect, admitted by the answers of Shaw, and from which, particularly the letter and answer of the 9th and 10th of February, I think a jury might properly come to the conclusion that the plaintiff waited at the request of the defendant, but which contain nothing to shew that the plaintiff entered into any contract which it would be necessary should be in writing.

(1) 6 M. & W. 109.

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LUSH, J. The question is whether there was any evidence to go to the jury that the plaintiff was entitled to more damages than the 100*l.* paid into court. The contracts were broken at the end of June and July, and it is admitted that if the plaintiff had gone into the market at once, and bought in August, the sum paid into court is sufficient. He did, in fact, buy in February, and the question is, whether he was justified in waiting till February. Was he entitled to wait, or ought he to have bought in August? I do not agree that the cases cited have any bearing on the question. In *Stead* v. *Dawber* (1), and the other cases cited, the parties, before the time for the performance of the contract had come, intended to alter the contract, and agreed to extend the time for performance; and the question was, whether the substituted contract could be enforced, and it was held that it could not, because it was partly in writing and partly by parol, and, being for the sale of goods, was within the Statute of Frauds. But here there is no agreement shewn to alter the contracts. After the expiration of the time limited for the performance of the contracts, the plaintiff being entitled at once to sue for damages for the breach, the defendant, the seller, requested the plaintiff, the buyer, to wait and postpone his remedy, in order to enable the seller, if he could, to deliver the iron; the plaintiff accordingly waited. At no time was there any binding contract on the plaintiff to wait, and the defendant remained all along in default. The contract was broken in July. The question is, was the plaintiff, under the circumstances, justified in waiting till February, and then going into the market and buying? I think he was. I see no reason why, after a breach of contract by non-delivery at the proper time, the buyer should not wait at the express or implied request of the seller, with an understanding between the parties that if the buyer should wait, he would still be entitled, if the seller turned out ultimately unable to deliver, to do that which he was entitled to do in the first instance, namely, go into the market and buy at the then price. Was there, then, evidence that this was the understanding between the parties in the present case? The correspondence, commencing with the letters of the 5th of August, 1865, more particularly the letters written in December, 1865, and

(1) 10 Ad. & E. 57.

in January and February, 1866, shew that Shaw intended that the parties should wait, and that the plaintiff did wait according to Shaw's request, until there was no chance of his getting the iron; and he was, therefore, justified in then going into the market and buying; and there was evidence to justify the larger amount of damages.

Rule discharged.

Attorneys for plaintiff: *Slater & Dommett, for Slater & Barling, Manchester.*

Attorneys for defendant: *Young, Maples, & Co., for H. B. & C. Wright, Sunderland.*

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SHARPE *v.* JAMES.
SPARK AND HOLLINGSWORTH, CLAIMANTS.

Feb. 26.

Bill of Sale—Assignee of Registered Bill of Sale, Priority of, over Assignee of earlier Unregistered Bill—17 & 18 *Vict. c.* 36, *s.* 1.

The 17 & 18 Vict. c. 36, s. 1, requires that every bill of sale of goods shall be registered within twenty-one days after it is made, otherwise it shall be null and void as against all assignees in bankruptcy, or under any assignment for the benefit of the creditors of the person making the bill of sale, and as against all sheriffs' officers, &c., executing process against, and the execution creditors of, such person, as to any of the goods which are then in his possession.

The defendant made a bill of sale of his goods to S. which was not registered; afterwards he made another bill of sale of the same goods to H., which was registered. Execution having issued against the defendant, the goods still remaining in his possession, S. and H. both claimed the goods, and an order was made by which the execution creditors were barred, and the proceeds of the goods ordered to be paid to H.:—

Held, that the order was right, and that S. could not, under the circumstances, set up against H. the prior unregistered bill of sale: for that the consequence of avoiding an unregistered bill of sale by execution is to displace the security altogether.

CASE stated by order of the Court.

The defendant James carried on the trade of a carver and gilder at No. 45, Skinner Street, and was possessed of certain goods, furniture, and stock in trade, on the premises.

On the 9th of April, 1864, the landlord of the premises distrained for the rent due on the 25th of March preceding, and the

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claimant Hollingsworth, on the 15th of April following, paid the sum of 33*l.* 6*s.* 6*d.*, the condemnation price of the goods distrained, and the expenses of the distress, to prevent the goods which were seized from being sold by the landlord.

By a deed poll dated the 12th of April, 1864, the defendant, in consideration of 150*l.* therein expressed to be paid by John Spark, and which had been paid by him on or before that day, assigned unto John Spark all his goods, household stuff, and implements of household chattels, wearing apparel, stock in trade, and effects, whatsoever then being in the dwelling-house, shop, and premises of the defendant, situate at No. 45, Skinner Street, or which thereafter should be thereon, and all other his chattels, and effects whatsoever and wheresoever, unto John Spark, his executors, administrators, and assigns absolutely, as his and their own goods, chattels, and effects.

This deed was never registered as a bill of sale, pursuant to 17 & 18 Vict. c. 36, and Hollingsworth had no notice or knowledge of the transactions with Spark.

On the 21st of April, 1864, the defendant executed a bill of sale to Hollingsworth of all the defendant's property which was upon the premises, and which was comprised in the bill of sale to Spark of the 12th of April. The consideration for the same was the sum of 150*l.* then lent and advanced by Hollingsworth to the defendant.

The above-mentioned advances by Spark and Hollingsworth were respectively made by each bonâ fide.

The last-mentioned bill of sale of the 21st of April was, on the 11th of May, 1864, duly registered as required by 17 & 18 Vict. c. 36, and Hollingsworth put a man in possession of the property comprised in the bill of sale on the same 21st of April, 1864, who remained in possession until after the sale of the property, in pursuance of an order of Mellor, J.

On the 9th of May, 1864, the defendant executed another bill of sale by deed poll to Spark of the same goods and for the same consideration as the former bill of sale of the 12th of April, 1864. This bill of sale of the 9th of May, 1864, was duly registered under the statute on the 14th of May, 1864.

On the 3rd of May, 1864, a man went into possession, on behalf of Spark, of the property assigned by the deeds poll, and in the

evening of the same day withdrew from the premises, in obedience to a letter sent to him by the attorney of Spark. This letter was sent, after a proposal and promise on the part of the defendant to arrange without delay the matter of Spark's claim, to avoid a disposal of the property so seized.

The same man went again into possession of the property, on behalf of Spark, on the 13th of May, 1864, and remained in possession until the sale of the property, in pursuance of the order of Mellor, J.

On both of these occasions the man who took possession had and produced his authority for such purpose. The authority of the 13th of May contained a reference to the bill of sale of the 9th of May, 1864.

Actions were brought against the defendant by the plaintiffs Richards and Sharpe, and writs of fi. fa. were issued, and the sheriff levied upon the property on the 11th and 14th of May, 1864, and on the sheriff entering and levying, Spark claimed the property under the bill of sale of the 12th of April, 1864, and Hollingsworth claimed the same property under the bill of sale of the 21st of April, 1864. The sheriff thereupon took out an interpleader summons, and Hollingsworth and Spark appeared on the return thereof and claimed the goods.

On the 17th of May, 1864, an order was made by Shee, J., directing the property to be sold, and the proceeds of the sale to be paid to the sheriff, to be held subject to further orders.

On the 21st of May, 1864, an order was made by Mellor, J., that the execution creditors be barred in both actions; that no action be brought against the sheriff; that the proceeds of the sale, after satisfying the claimant Hollingsworth, and less expenses of sale and possession money, be paid to the second claimant Spark; and that the sheriff do withdraw from possession of the whole of the property seized.

On the hearing of the summons before Mellor, J., and before he made the last-mentioned order, the attorney for the claimant Spark produced to the judge the second and registered bill of sale to Spark, dated the 9th of May, 1864, and also the prior bill of sale to Spark, dated the 12th of April, 1864.

On the 6th of June, 1864, Spark obtained a rule, that Hollings-

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worth should shew cause why the last-mentioned order of Mellor, J., should not be varied in this respect, namely, that after payment of the expenses and possession money, as directed by the order, the proceeds of the sale be paid to the claimant Spark in priority to Hollingsworth, or why the right of the claimants should not be ascertained by an issue or special case.

On the 13th of June cause was shewn against the rule, and the Court ordered that a special case be stated.

Jan. 22. *Pearce*, for the claimant Spark. Under the 17 & 18 Vict. c. 36, s. 1, a bill of sale, unless registered within twenty-one days after it is made, is void "as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process . . . and against every person on whose behalf such process shall have been issued." Spark's first bill of sale is only void as against the execution creditors; it is good against the grantor and all persons claiming under him: it is good, therefore, as against Hollingsworth. Spark is therefore entitled to be paid in priority to Hollingsworth, and the judge's order to this extent ought to be varied.

Philbrick, for the claimant Hollingsworth. It is quite true that the 17 & 18 Vict. c. 36, does not, in terms, avoid a bill of sale against a subsequent assignee of the goods, but only as against the persons mentioned in the statute. The Court, however, will not allow the assignee of an unregistered bill of sale, which is void against an execution, to defeat the title of a subsequent assignee who has registered his bill of sale, for it would be allowing that to be done indirectly which the act forbids to be done directly: *Stansfeld* v. *Cubitt*. (1) In *Edwards* v. *English* (2) the Court refused to allow an execution creditor to set up the right of a third person under an unregistered bill of sale against an assignee under a subsequent registered bill of sale, and Crompton, J., in his judgment, remarked: "The claimant under the first bill of sale, it is said,

(1) 2 De G. & J. 222; 27 L. J. (Ch.) 266. (2) 7 E. & B. 564; 26 L. J. (Q.B.) 193.

5 Jur. N.S. 395. 3 Jur. N.S. 934-5.

might demand the goods, but I am inclined to think that facts might be pleaded which would be a good defence to any action by the assignee under the first bill of sale, if not at law, certainly in equity." *Nicholson* v. *Cooper* (1) also supports this view; and in *French* v. *French* (2) the same principle was applied to the 13 Eliz. c. 5.

Cur. adv. vult.

Feb. 26. The judgment of the Court (Cockburn, C.J., Blackburn and Lush, JJ.), was delivered by

LUSH, J. This was a special case stated by direction of the Court in order to determine the rights of two parties, Hollingsworth and Spark, under an interpleader order made in these causes. By that order, dated the 21st of May, 1864, the two execution creditors were barred, and it was ordered that the goods of the defendant, the execution debtor, should be sold by the sheriff, and the proceeds applied, first, in satisfying the claim of Hollingsworth, and, secondly, in or towards payment of the claim of Spark. Spark appealed against so much of the order as postponed his claim to that of Hollingsworth, and the question is, which of the two claimants is entitled to priority.

By a bill of sale, dated the 12th of April, 1864, the defendant James assigned the goods in question to Spark. This bill of sale was never registered. On the 21st of the same month of April the same goods were assigned by James to Hollingsworth, who, on the 11th of May, registered this bill of sale. Spark, on the 9th of May, procured from the defendant James another bill of sale for the same consideration as the former, and registered that bill of sale on the 14th of the same month.

No question arises upon this second bill of sale of Sparks. The execution creditors being content to be barred, Spark's title to the surplus was not contested. The sole question argued was, the validity of his first security as constituting a prior title to the goods.

On the 11th and 14th of May, the sheriff levied under executions against the defendant James, and claim being made both by Spark

(1) 3 H. & N. 384; 27 L. J. (Ex.) 393.
(2) 6 De G. M. & G. 95; 25 L. J. (Ch.) 612.

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and Hollingsworth, the sheriff took out an interpleader summons. Upon that summons the order in question was made, whereby the execution creditors were barred, and the proceeds of the sale ordered to be distributed in the manner before mentioned.

It was contended on behalf of Spark that, although his unregistered bill of sale was not available as against the execution creditors, yet that it was available as against James, the assignor, and consequently as against Hollingsworth, who claimed under him; and that as the execution creditors were barred, and their claims to the goods were out of the way, Spark was entitled to enforce his prior security as against Hollingsworth.

The statute 17 & 18 Vict. c. 36, s. 1, imposes as the penalty for not registering a bill of sale within twenty-one days that, "such bill of sale shall, as against all assignees of the estate and effects of the person whose goods are comprised therein under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs officers and other persons seizing any property or effects comprised therein, in the execution of any process of any court of law or equity, authorizing the seizure of the goods of the person by whom such bill of sale was made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process, and after the expiration of such period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale."

At the time of levying the execution the goods were in the apparent possession of James, the execution debtor, and as this was more than twenty-one days after the making of the first bill of sale, that bill of sale was as against the execution "null and void to all intents and purposes whatsoever." And had it not been for Hollingsworth's subsequent registered bill of sale, the execution creditors would have been entitled to the proceeds of the goods seized. It is equally clear, on the other hand, that had there been

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no execution, and had the question been merely which of the two claimants was entitled to priority against the other, Spark's claim would have prevailed, because there is nothing in the act which makes it necessary to register a bill of sale as against the holder of a subsequent bill of sale, whether the latter be registered or not.

What, then, is the consequence of avoiding a bill of sale by an execution? Is it to displace the security altogether, or is it only to neutralize it so far as it affects the interest of the execution creditors, and to leave it operative as to all other interests?

We are of opinion that the consequence is to displace it altogether, and that in no other way can due effect be given to the statute.

But for Hollingsworth's registered bill of sale Spark would, under the circumstances stated, have had no title, but the execution creditors would have taken the goods. It is because he had none, which he could, in the events which happened, set up, that Hollingsworth came in as the first claimant; and had there been no third bill of sale, the surplus proceeds must have been given to them. It would be a strange anomaly if, having recovered by force of his better title goods which otherwise the execution creditors would have retained, Hollingsworth should be ordered to give them up to Spark, who could not himself have recovered them from these creditors. This would be in effect to make Spark's bill of sale valid as against the execution creditors, because it would enable him by means of it to get the goods which as against him the execution creditors are entitled to keep.

We should, therefore, even if there had been no decisions bearing on the point, have been of opinion that Hollingsworth was entitled to priority. But we find abundant authority for this conclusion in the cases decided upon the analogous act of the 13 Eliz. c. 5. Many of them are cited and commented on in Roberts on Fraudulent Conveyances, ch. 5, s. 5, p. 591, and they are summed up by Vice-Chancellor Kindersley in *Hue* v. *French* (1), where he says: "The manner in which courts of equity construe that statute is, that the instrument by which a debtor makes a voluntary assignment is (assuming it to be fraudulent as against credi-

(1) 26 L. J. (Ch.) 317.

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tors) to be regarded as if it had never existed." The same doctrine was propounded by this Court in *Shears* v. *Rogers*. (1)

The rule for varying the interpleader order must therefore be discharged.

Rule discharged.

Attorneys for Hollingsworth: *Grane, Son, & Fesenmeyer.*
Attorney for Spark: *H. Earle.*

Jan. 28.

THE QUEEN *v.* THE LORD MAYOR OF THE CITY OF LONDON.

Compensation—Construction of Statutes incorporating the Lands Clauses Consolidation Act, with exception in general terms—8 *Vict. c.* 18, *ss.* 5, 121—*London City Improvement Act*, 1847 (10 *& 11 Vict. c. cclxxx.*), *ss.* 1, 19, 21—*Holborn Valley Improvement Act*, 1864 (27 *& 28 Vict. c. lxi.*), *s.* 5.

4 Eq. 229 4 QBD. 647 648 5 Pp Cas 418

By s. 1 of the London City Improvement Act (10 & 11 Vict. c. cclxxx.) the Lands Clauses Consolidation Act is incorporated so far as the provisions are not expressly varied or excepted; by s. 19, "so much of the Lands Clauses Consolidation Act as relates to the purchase of land otherwise than by agreement" is not to be incorporated in this act; by s. 5 of the Holborn Valley Improvement Act (27 & 28 Vict. c. lxi.) all the provisions, &c., of the London City Improvement Act, except s. 19, and of the Lands Clauses Consolidation Act, except "the part with respect to the purchase and taking of lands otherwise than by agreement," are incorporated, except so far as the said provisions, &c., are repealed, altered, or varied by, or are inconsistent with, the provisions of this act:—

Held, that the Lands Clauses Consolidation Act was incorporated with both the special acts, excepting only the clauses (16–68) which come under the heading "with respect to the purchase and taking of lands otherwise than by agreement;" and that the other clauses, which relate to the purchase of lands otherwise than by agreement, but do not come under that heading, were not excepted.

Section 121 of the Lands Clauses Consolidation Act, which enacts that compensation to a person having no greater interest than as tenant from year to year shall be determined by two justices, comes as a proviso upon the clauses which enact in general terms that compensation for *any* interest in land is to be assessed by a jury: and s. 121 may therefore be treated as a proviso to, and not inconsistent with, the clauses in the special acts which enact in equally general terms that compensation for any interest in land is to be assessed by a jury; consequently, compensation to a person having no greater interest than as tenant from year to year in premises required under the Holborn Valley Improvement Act can only be determined by justices.

THIS was a demurrer to the return to a mandamus.

The case turned entirely on the construction of the statutes; and

(1) 3 B. & Ad. 362.

the mandamus, return, and different sections sufficiently appear in the judgment of the Court and notes.

Jan. 16. *E. James, Q.C.* (*Sir G. Honyman, Q.C.*, with him), for the prosecutor. He cited *Leaf* v. *Robson* (1); *Gillan* v. *Deare.* (2)

Mellish, Q.C. (with him *Hannen*), for the defendant. He cited *Eastern Counties Railway Company* v. *Marriage.* (3)

Cur. adv. vult.

Jan. 28. The judgment of the Court (Cockburn, C.J., Blackburn and Lush, JJ.) was delivered by

BLACKBURN, J. This is a demurrer to a return to a writ of mandamus.

It appears by the suggestions in the writ (4) that Robert Groom, the prosecutor, was on the 1st of June, 1865, interested in a warehouse, part of the lands which the corporation of London are by the Holborn Valley Improvement Act authorized to take; and that he was and continued to be occupier of the premises until the 13th of December, 1865. That on the 13th of June, 1865, by a notice dated the 1st of June, 1865, he was informed, that the corporation required the premises for the purposes of the act, and offered to treat and agree for the purchase of his interest therein, and for compensation for any injury or damage sustained by him in consequence of the execution of the act, and required possession at the expiration of six months from the service of the notice, as by a clause (s. 13) in the London City Improvement Act they are entitled to do. That Groom gave up possession accordingly, and being unable to agree with the corporation as to the amount of compensation, required the lord mayor to issue his warrant to the sheriffs for summoning a jury to assess the amount (5), which he

(1) 13 M. & W. 651.

(2) 3 D. & L. 412.

(3) 9 H. L. C. 32; 31 L. J. (Ex.) 73.

(4) The writ commenced by reciting at length s. 5 of the Holborn Valley Improvement Act, post, p. 297, note (2).

(5) Under s. 21 of the London City Improvement Act (10 & 11 Vict. c. cclxxx.), which enacts: "If any person interested in, or entitled to, or by this act enabled to sell and convey any lands described in the schedule to this act annexed, or any share, estate, or interest therein, or charge thereon, as aforesaid, or any occupier thereof, sustaining such loss, injury, or damage, as aforesaid, for and on his part, or for or on the part of his cestui que trust or ward, or of any other person as aforesaid, shall refuse to accept such pur-

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refused; and the mandatory part of the writ is to command him to issue his warrant accordingly.

The return is that Groom had no greater interest than as tenant from year to year, and this is admitted by the demurrer. If, therefore, the compensation for the interest of a person with no greater interest than from year to year is to be assessed by a jury, the return is bad, and judgment should be for the Crown; but if the compensation is in such a case to be assessed by justices, the return is good, and judgment must be for the defendant.

The question, therefore, comes to be, whether the 121st section (1)

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chase money, satisfaction, or recompense, or other compensation as shall be offered by the mayor, aldermen, and commons, or any person authorized by them on their behalf; or if any person interested in, or entitled to, or by this act enabled to sell and convey any such lands as aforesaid, shall (upon such notice in writing as hereinbefore is mentioned, having been so given, left, or affixed as aforesaid), for the space of one month next after such notice, neglect or refuse to send in a statement of the particulars of his claim in respect of any lands, or shall neglect, or refuse to treat, or agree, or shall not agree, or by reason of disability cannot agree, with the mayor, aldermen, and commons, or with any person authorized by them, for the sale or conveyance of such lands, or any share, estate, or interest therein, or charge thereon, who shall not produce and evince a clear title to the premises he is in possession of, or to the interest he shall claim therein, to the satisfaction of the mayor, aldermen, and commons, or of the person so authorized by them;—then and in every or any such case, the lord mayor of the said city for the time being, shall be, and is hereby empowered, thereupon or at any time thereafter, to issue a warrant or precept under his hand and seal of office, to the sheriffs of the city of London, commanding such sheriffs to summon, return, and impanel a jury."

The section then provides for the summoning, &c., of a jury to the court of the mayor and aldermen of the city of London, and proceeds: "And the said jury shall inquire of, assess, and ascertain, and give a verdict for, the sum of money to be paid for the purchase of, or a satisfaction or recompense for, either the entirety of such lands, or for any share, estate, or interest therein, or charge thereon, as in such warrant or precept shall be directed; and the compensation which shall be made in respect of any improvements, or injury, or damage whatsoever, to be lost or sustained as aforesaid to any person, as in such warrant or precept shall be directed; and the said court of mayor and aldermen shall give judgment for such purchase money, satisfaction, recompense, or compensation so to be assessed," &c.

(1) 8 Vict. c. 18: "And with respect to lands subject to leases, be it enacted as follows." Then follow ss. 119, 120, which enact that when parts only of such lands are taken, the amount is to be apportioned, and the tenants compensated for severance, &c.

s. 121: "If any such lands shall be in possession of any person having no

of the Lands Clauses Consolidation Act (8 Vict. c. 18), is or is not incorporated in the Holborn Valley Improvement Act, 1864 (27 & 28 Vict. c. lxi.).

That again depends on the proper construction of the 5th section of that act; and as that section is framed as incorporating the London City Improvement Act (10 & 11 Vict. c. cclxxx.), with some alterations, and also the Lands Clauses Consolidation Act, 1845, with an obscurely penned exception; and as the City of London Improvement Act was itself framed by making various new enactments, and also by incorporating the Lands Clauses Consolidation Act with a differently penned exception, it is impossible to construe this section without reading all three acts; and, as is to be expected under such a mode of legislation, we find that the provisions of the acts are not in harmony, and that it is difficult to read them together.

We are, however, bound to do so if possible, and we think the result is that s. 121 of the Lands Clauses Consolidation Act must be considered in force and applicable in the present case, and that consequently the judgment must be for the defendant.

The Lands Clauses Consolidation Act was passed to make a general code regulating the manner in which lands might be taken under the authority of parliament, and compensation made for injury occasioned by what was thus legalized by the legislature; and we think that, in construing any acts of parliament passed since that act, we ought to suppose that the legislature intended to follow this code, except where, by the express language of the

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greater interest therein than as tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if any part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation, all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special act."

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special act, or by necessary intendment from its provisions, it appears that the intention of the legislature was in some particular to depart from that general code, and substitute something else. Now the legislature has, with a view to facilitate the incorporation of the whole or parts of the code with any special act, headed different sets of the clauses in the Lands Clauses Consolidation Act, which, in the language of that act, form "an enactment," with different headings, and have by s. 5 enacted that each such set of clauses may be incorporated by describing them as "the clauses of the act referring to the matter in the words introductory to the enactment intended to be incorporated." (1)

Amongst these enactments is one including the clauses, ss. 16 to 68 inclusive. The words introductory to this enactment are, "And with respect to the purchase and taking of lands otherwise than by agreement."

But, though the clauses under this introductory heading all do refer to the purchase and taking of land otherwise than by agreement, they are not by any means the only clauses that do so refer.

The clauses "with respect to the purchase money or compensation coming to persons having limited interests, or prevented from treating or not making title," ss. 69 to 80, are all applicable to cases in which the lands cannot be taken by agreement. So are many of those relating to "the conveyance of lands," ss. 81 to 83. So are many of those relating to "entry on lands by the promoters," s. 84, &c.; and "with respect to lands subject to mortgage," s. 108, &c.; and "with respect to lands charged with any rent service, rent charge, or chief or other rent, or payment, or incumbrance not hereinafter provided for," s. 115, &c.

(1) 8 Vict. c. 18, s. 5: "And whereas it may be convenient in some cases to incorporate with acts of parliament hereafter to be passed, some portion only of the provisions of this act: be it therefore enacted, that, for the purpose of making any such incorporation, it shall be sufficient in any such act, to enact that the clauses of this act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this act in the words introductory to the enactment with respect to such matter), shall be incorporated with such act; and thereupon all the clauses and provisions of this act with respect to the matter so incorporated shall, save so far as they are expressly varied or excepted by such act, form part of such act, and such act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such act shall relate."

And to come nearer to the particular section on which the present question turns, the enactment "with respect to lands subject to leases," comprises four clauses, in which the first two, viz. s. 119 and s. 120, apportioning the rents and covenants and conditions, where part only of a leasehold is taken, are no doubt applicable and convenient where there is an agreement, as in such a case they obviate the necessity of providing for this object in the agreement, but are indispensable where the lands are taken otherwise than by agreement. And the clauses immediately following, s. 121 and s. 122, are only applicable in cases where there is no agreement. (1)

Now, in the first of the special acts at present before us, the London City Improvement Act, 1847, 10 & 11 Vict. c. cclxxx., the draftsman has chosen to deviate from the mode given by the Lands Clauses Consolidation Act, for incorporating parts of that act. It is enacted by the 1st section "that the Lands Clauses Consolidation Act, 1845, so far as the provisions thereof are not *expressly* varied by or excepted from this act, shall be incorporated with and form part of this act." And by s. 19, that "so much of the Lands Clauses Consolidation Act, 1845, as relates to the purchase of land otherwise than by agreement, shall not be incorporated with, or form part of this act;" and then follow clauses no doubt intended to be substituted for the portion of the Lands Clauses Consolidation Act, 1845, thus excluded from the act, and to be read along with the portion of the Lands Clauses Consolidation Act, 1845, incorporated with it.

It is to be observed that in s. 19 of the London City Improvement Act, the words used for the purpose of describing an exception, are not precisely those used in the words introductory to the enactment, comprising clauses 16 to 68 in the Lands Clauses Consolidation Act, 1845, which were inserted in that latter act for the purpose of facilitating incorporation, the words used being, in fact, those printed as a side note on the margin of the latter act; but we can have very little doubt that it was intended to express the same thing; and in the Holborn Valley Improvement Act, (27 & 28 Vict. c. lxi), s. 5 (2), the 19th section of the London City Improvement Act is excepted from the general incorporation of

(1) See ante, p. 294. note (1).

(2) 27 & 28 Vict. c. lxi. s. 5: "All the powers, authorities, restrictions, provisions, and savings contained in the

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that act with the Holborn Valley Improvement Act, for the purpose of inserting an incorporation of the Lands Clauses Consolidation Act, 1845, with an exception of part of it, which exception is penned in words more nearly approaching, than those in the 19th section of the London City Improvement Act, to those directed to be used in the 5th section of the Lands Clauses Consolidation Act, 1845.

We think that the effect is that the Lands Clauses Consolidation Act, 1845, is incorporated both in the London City Improvement Act, 1847, and in the Holborn Valley Improvement Act, 1864, with the exception of the clauses from s. 16 to s. 68, both inclusive. The words used might possibly be strained to bear the sense that *all* clauses in the Lands Clauses Consolidation Act, 1845, which in any way bear upon the subject of the taking of lands otherwise than by agreement, are to be excluded; but if this construction is put upon the act, many clauses under other heads than that which introduces the clauses 16 to 68 must be excluded, though almost indispensable for the working of such an act, and yet no substitute is provided for them in the special act. We think, therefore, that we must read the special acts here as if they in terms re-enacted the other clauses of the Lands Clauses Consolidation Act, 1845, including, therefore, section 121.

This is not absolutely decisive of the question; for if the enact-

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London City Improvement Act, 1847, (hereinafter called the Improvement Act of 1847), except section 19 thereof, and in the Lands Clauses Consolidation Act, 1845, except the part of the last mentioned act with respect to the purchase and taking of lands otherwise than by agreement, and in the Lands Clauses Consolidation Act, 1860, shall extend and be applied to this act, with reference to the taking of lands, and the construction, execution, and performance of the viaduct or raised way, new streets and improvements, and other matters and things by this act authorized, and shall be in as full force and effect to all intents and purposes whatsoever, as if the same had been in this act repeated and re-enacted, mutatis mutandis, and made applicable to the subject matter hereof, *except only so far as the same powers, authorities, restrictions, provisions, and savings, or any of them, are repealed, altered, or varied by, or are inconsistent with, any of the provisions of this act;* and for the purposes of the present act, the term "this act" throughout the Improvement Act of 1847, shall be read and have effect as meaning the present act; and for the same purposes the Improvement Act of 1847 shall have effect, subject and according to the following provisions," &c. This section was set out at length in the mandamus.

ments of the special act are such as to shew that it was the intention of the legislature to establish such a scheme as must exclude the 121st section, that intention must prevail.

It is true that the special act enacts that the Lands Clauses Consolidation Act, 1845, so far as the provisions thereof are not *expressly* varied by, or excepted from, this act, shall be incorporated with and form part of this act (1), but we do not think that this renders express words indispensable to shew an intention to exclude enactments which have been (it may be by inadvertence) in terms incorporated in the act.

This much, however, we may say, that it is not enough that the words of the special enactments are not aptly chosen so as to be in harmony with the enactments in terms incorporated with the act; nor is it even enough that the language of the special enactments is so incongruous with the incorporated enactments as to shew that the person who prepared them had forgotten, or perhaps had never known, what those incorporated enactments were. It must go as far as this, that the special enactments shew that the legislature intended to exclude an enactment which, by an accident (not unlikely to occur in this mode of legislation), they have inadvertently incorporated contrary to what they intended.

Now, the enactments in the London City Improvement Act, 1847, beginning with s. 20, are not artificially prepared, and their working is not such as to harmonize with the sections of the Lands Clauses Consolidation Act, 1845, but they may well be read together, with the exception of clause 22 of the London City Improvement Act. (2) The provisions (with that exception) are

(1) These are the terms used in s. 1 of the London City Improvement Act; the language is different in s. 5 of the Holborn Valley Improvement Act: see ante, p. 297, note (2), which was the section relied on by counsel in argument.

(2) 10 & 11 Vict. c. cclxxx. See s. 21, ante, p. 293, note (5).

s. 22: "If the owner, lessee, or occupier of any lands authorized to be taken by virtue of this act shall not be inclined to sell or part with the whole thereof, or of his interest in the whole thereof, and it shall not be found necessary to take the whole for the purposes of this act, and the said parties cannot agree as to the sum of money to be paid for the part which the mayor, aldermen, and commons, or any person authorized by them, shall not think it necessary to purchase, then and in such case, the jury which shall be summoned to value the premises, shall assess the value of the whole premises according to the condition in which

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general, relating to all interests in land and all occupiers; and they enact, in general terms, that the compensation shall be assessed by a jury, summoned according to the special act. These are substitutes for the clauses from 16 to 68 in the Lands Clauses Consolidation Act, 1845, which also, in general terms, enact that the compensation for all interests in land (words certainly sufficient to include the interest of a tenant from year to year) (1), shall be assessed by juries under that act.

The 121st section of the Lands Clauses Consolidation Act, 1845, comes by way of proviso, taking out of the previous general enactment providing for everything, a particular branch for which it makes a particular provision. This is the proper office of a proviso, as distinguished from an exception, and s. 121 may as well stand as a proviso on the enactments in the London City Improvement Act, as on those under the heading, "with respect to the purchase and taking of land otherwise than by agreement," in the Lands Clauses Consolidation Act. Section 22 (2) of the London City Improvement Act is, however, no doubt so worded as to create an incongruity. It is plain that the framers of it thought that all compensation to occupiers of land taken was to be assessed by jury, either forgetting, or never being aware, that the 121st section of the Lands Clauses Consolidation Act, 1845, was incorporated with the London City Improvement Act; and if there should arise a case in which an occupier, whose interest is not greater than that of tenant from year to year, wishes to keep part of the premises, and the corporation do not wish to take the whole, and yet the parties cannot agree on the amount of compensation, a difficulty may arise. It is not likely that such a case will occur, but when it does it must be dealt with. It is enough to say now that such an incongruity does not amount to an express variation or exception of the

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they are at the time of taking the view, and also the value of that part of the premises which shall remain after the mayor, aldermen, and commons, or the persons authorized by them, have taken away so much as they shall think necessary for the purposes of this act; and the jury having made these two valuations, the difference between them shall be the price to be paid by the mayor, aldermen, and commons, for that part which they shall have occasion for, and such price shall be recorded as the verdict of the jury for the value of the same."

(1) See ss. 22, 23.

(2) See ante, p. 299, note (2).

clause 121 from the general enactment, and consequently does not affect the present question.

We think, therefore, that the return is good, and that judgment must be for the defendant.

Judgment for the defendant.

Attorney for prosecutor: *Gregson.*

Attorney for defendant: *T. J. Nelson.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 1.

TARNER *v.* WALKER.

Reward, action for—Information "leading to" apprehension of Offenders—Remoteness of Cause.

The defendant's shop having been broken into, and watches and jewellery stolen, the defendant advertised, along with a description of the stolen property, "a reward will be given to any person who will give such information as shall lead to the apprehension and conviction of the thieves." In about a week R. brought one of the stolen watches to the plaintiff's shop, the plaintiff gave information, and R. was arrested at the plaintiff's shop with another of the stolen watches upon him. After two or three days R., being in custody, told the police that the thieves would be found at a certain shop, and they were apprehended there a week afterwards, and subsequently convicted, R. being convicted as receiver. The plaintiff having brought an action for the reward, at the trial the above facts were proved; but the police officers swore that the information given by R. was not the means of the thieves being apprehended, as the police were already watching the shop. The judge left the facts to the jury, and they returned a verdict for the plaintiff, finding that the thieves were apprehended in consequence of R.'s information:—

Held, affirming the judgment of the Court of Queen's Bench, that the information given by the plaintiff was not so remote as that it could not be said to have "led to" the apprehension of the thieves; and that the judge properly left the evidence to the jury, pointing out the remoteness of the information from the result.

APPEAL by the defendant from the decision of the Court of Queen's Bench discharging a rule for a new trial.

The following is the case as stated on appeal (1):—

The declaration alleged, that the defendant on the 7th of

(1) See Law Rep. 1 Q. B. 641, where the facts are fully stated; but as the case as stated upon appeal is somewhat different, the facts are given as stated by the parties.

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February, 1865, published a handbill and advertisement stating that certain goods therein described had been stolen from the defendant's shop, and the defendant thereby promised that, "a reward of 250*l.* will be given to any person who will give such information as shall lead to the apprehension and conviction of the thief or thieves; and a further reward of 750*l.* will be paid for such information as shall lead to the recovery of the property, or in proportion to any part thereof recovered. Information to Inspector Hamilton, City Police, Detective Office, 26, Old Jewry, E.C., London." That the plaintiff gave such information as led to the apprehension and conviction of the thieves, and such information as led to the recovery of part of the property, yet the defendant has not paid the said rewards.

Second count for work done, and on an account stated.

Pleas. 1. As to so much of the first count as relates to the reward claimed by the plaintiff for having given such information as led to the apprehension and conviction of the thieves, that the plaintiff did not give such information. 2. To so much of the first count as claimed a proportion of the reward for the recovery of the property, payment of 11*l.* into court. 3. As to the residue of the declaration, never indebted.

The plaintiff joined issue on the 1st and 3rd pleas; and as to the 2nd plea, replied that the 11*l.* was not enough to satisfy the plaintiff's claim.

Issue joined.

At the trial before Blackburn, J., at the sittings in London after Michaelmas Term, 1865, it appeared that the defendant carried on business as a jeweller, in Cornhill, London, and between Saturday, the 4th, and Monday, the 6th, of February, 1865, his shop was burglariously entered, and property to the amount of 6000*l.* stolen. On Tuesday, the 7th of February, the defendant issued a handbill and advertisement, of which the following is a copy:—

"£1000 reward. Stolen, between 7.40 p.m., the 4th, and 8.30 a.m., on the 6th February, 1865, from the shop of Mr. Walker, watch and chronometer maker, 68, Cornhill, the following property, viz." (here followed a long list of watches and their numbers, and other articles). At the foot of the handbill and advertisement

were printed the words set out between inverted commas in the declaration.

At the time of the robbery the plaintiff carried on business in Clerkenwell, as a watchmaker and jeweller. On the 14th of February one David Roberts called at the plaintiff's shop, and produced a new watch, numbered 3781, having the name of Walker partially erased; Roberts wished to have this watch repaired, and left it with the plaintiff, saying that he had another similar watch which he wanted to sell, and the plaintiff appointed to see him in the afternoon of the same day, when the plaintiff would have the watch repaired, and Roberts was to bring the other watch with him. Previously to the time appointed the plaintiff called at the shop of the defendant, and produced the watch left with him by Roberts to a son of the defendant, and he identified it as one of those stolen and referred to in the handbill and advertisement. The plaintiff then informed the defendant's son of the appointment that he had made with Roberts for the afternoon of that day, and it was then arranged that the defendant's son should see Inspector Hamilton, which he did, and an arrangement was made that Inspector Hamilton and other officers should be in attendance in the parlour at the back of the plaintiff's shop at the time appointed for Roberts to call.

Roberts attended at the plaintiff's shop in the afternoon of the same day, and was then taken into custody by Inspector Hamilton, in consequence of a signal given by the plaintiff, and previously arranged with the inspector, and another watch was found upon Roberts, which the defendant admitted to be another of the stolen watches.

At the time Roberts was arrested no person had been taken into custody for the burglary.

Roberts was taken before a magistrate, committed for trial, and was indicted and tried jointly with three other persons on the 12th of April, 1865, at the Central Criminal Court, for burglariously entering the premises of the defendant. Roberts was convicted of feloniously receiving the two watches, and the three other persons were convicted of the burglary. The plaintiff did not give evidence before the magistrate or at the trial.

Roberts was examined at the trial as a witness on behalf of the

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plaintiff, and stated that he was a weaver by trade, and had been entrusted with the two watches for disposal; also that [when in custody] he had desired two persons, Mr. and Mrs. Ade, to call upon Inspector Hamilton, and inform him that he, Roberts, wished to see him.

Mrs. Ade was examined as a witness, and stated that on the 17th of February she had requested Inspector Hamilton to see Roberts at Newgate.

Roberts stated that Inspector Hamilton and Sergeant Foulger came, and took down in writing his information, which was that the burglars were to be found at an eelpie shop in Whitechapel Road.

The police officers, Sergeants Moss, Potter, and Ranger, on the 24th of February, 1865, arrested two of the burglars at 122 or 124 in the Whitechapel Road, and found there a large quantity of stolen property mentioned in the placard, and immediately afterwards on the same day the third burglar was arrested at Ely Terrace, Bow Common, by the same officers.

Sergeant Moss stated that he was under the direction of the commissioner of the city of London police; that he had watched the eelpie shop in Whitechapel Road a week or ten days before the 24th of February.

Inspector Hamilton, the head of the city detective police, stated that the information communicated to him by Roberts, which he took down in writing, was that he had heard something about an eelpie shop in Whitechapel Road; and that it was his duty to communicate all information received to the head of the police of the city of London, the commissioner, and that he did communicate this information to him, and that Sergeant Moss was under him, Inspector Hamilton. Sergeant Foulger stated that the arrest of the thieves was not in any way attributable to the plaintiff or to information given by Roberts; and Foulger stated that after receiving the information from Roberts, he went to several pie shops in the Whitechapel Road, and watched the house 122 or 124, Whitechapel Road, where one of the burglars was arrested, and that he reported every night to Inspector Hamilton what he did.

[The learned judge left the question to the jury, whether the information given by the plaintiff "led to the apprehension and conviction of the thieves;" pointing out that the police said the

information given by Roberts was not the cause of the apprehension of the thieves, that even if the jury thought it was the cause, still the information which the plaintiff gave, though the cause of Roberts being taken into custody, was very remote from the apprehension of the thieves. (1)]

The jury found a verdict for the plaintiff for the 250*l.*, the amount of the reward offered for the apprehension of the thieves, and a proportionate part of the 750*l.* (which was ascertained by an arbitrator to be 150*l.*), the jury finding that the thieves were found and the property recovered in consequence of Roberts's information. (2)

In Hilary Term, 1866, a rule was obtained for a new trial, on the ground that the judge ought to have directed the jury that the evidence in support of the first count, so far as related to the claim for the 250*l.* (3), was too remote, as there was nothing to shew that the information given by Roberts after his arrest was given at the instance of the plaintiff, or so as to entitle the plaintiff to say that he supplied information which led to the conviction and apprehension of the thief or thieves. Second, that the verdict was against the evidence.

In Trinity Term, 1866, after argument, the Court of Queen's Bench discharged the rule, giving the defendant leave to appeal.

Mellish, Q.C. (with him *Pearce*), for the defendant. The question is, was there evidence to go to the jury on which they were justified in finding that the information given by the plaintiff was the information which led to the apprehension and conviction of the thieves. No doubt the plaintiff's information led to the apprehension of Roberts and the recovery of the two watches found upon him. But the plaintiff took no further part in the matter after this. The defendant must now be bound by the find-

(1) No direction of the judge was set out in the case stated on appeal; the above is taken from the report in the court below: Law Rep. 1 Q. B. at pp. 642, 644.

(2) The jury also found that the 11*l.* was enough as the proportion of the reward for the recovery of the two watches found on Roberts.

(3) This was the form of the rule; but the Court of Queen's Bench, on granting leave to appeal, pointed out that it ought to apply to the proportion of the 750*l.* as well; the rule, however, appears not to have been amended.

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ing of the jury, that the thieves were found and the other property recovered in consequence of Roberts's information; but it is an open question whether the plaintiff's information led to that result. The question is, in effect, how far the well known doctrine, that you must look to the proximate and not to the remote cause, is applicable to a case like the present. If it was shewn that Roberts was induced to speak from being in custody, then no doubt the plaintiff's information was the causa sine quâ non of the apprehension of the thieves; but the immediate and direct consequence of that information was Roberts's arrest alone. Suppose Roberts had been an innocent receiver of the watches, he might yet have been able to give information of the thieves; but no one could say that any one but he had given such information as led to the apprehension of the thieves.

[KELLY, C.B. The guilt or innocence of Roberts cannot affect the question.]

The fact of his being able to give information is a mere accident. The real test is, upon whose information were the persons acting when they arrested the thieves and discovered the stolen property through watching the eelpie house? Clearly upon the information of Roberts, with which the plaintiff had nothing whatever to do. Without the fresh information, according to the finding of the jury, the police would not have traced the thieves to the shop. [The learned counsel then read the chief parts of the judgment of Blackburn, J., in the court below.] (1)

[MONTAGUE SMITH, J. The learned judge says the jury must be taken to have found that Roberts would not have "split" had he not been in custody; does not that supply the missing link?]

No further than to shew that the plaintiff's information was the causa sine quâ non.

[BRAMWELL, B. The latter part of my Brother Blackburn's judgment goes to shew, as it seems to me, that the rule is not in strictness applicable to a case like the present.]

How far one thing can be said to be the consequence of another, is well illustrated by the case of *Ionides* v. *Universal Marine Insurance Company*. (2) There, goods on board ship, during the late

(1) Law Rep. 1 Q. B. at pp. 644-5; 12 Jur. (N.S.) 809

(2) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.

American war, were insured, "warranted free from all the consequences of hostilities," and a light which had usually been kept burning on the coast was put out by the one party to distress the shipping of the other; the captain had lost his reckoning, and, missing the light on the coast, ran his ship on shore, and the goods were lost on the ship going to pieces;—it was held that this was not a loss in consequence of hostilities; and the judgment of Erle, C.J., points out that it is only when in the usual course of events a certain result follows from a given antecedent, that the relation of one to the other as cause and effect can be established. No such relation can possibly be shewn in the present case. There are very few cases bearing immediately on the subject; but *Smith* v. *Moore* (1), and *Lancaster* v. *Walsh* (2), may be referred to.

Parry, Serjt. (with him *Laxton*), for the plaintiff, was not heard.

KELLY, C.B. We are of opinion that the judgment of the Court of Queen's Bench must be affirmed. Public policy requires that courts of law should look substantially to the true merits in questions of this nature, and should not be too much disposed to indulge in the refinements belonging to the logic of the schools. In this case Blackburn, J. (whose every doubt in every case is entitled to the greatest consideration), although he himself doubted, appears to have taken, at the trial, the course which, in cases of this nature, we think a judge is bound to take; that is, whether the case consist of a single cause followed directly and immediately by a single consequence, or whether there be a chain of causes and consequences leading to the ultimate result, it becomes a judge, unless in doing so he would violate some principle of law applicable to that particular case, to leave the whole case to the jury, with such observations as he may think fairly warranted by the different facts of the case before him.

Now, in the present case let us see what the facts were. There can be no doubt at all that it was the information of the plaintiff, given to the defendant, which led, under the circumstances detailed in the evidence, to the imprisonment of Roberts. Well, then, Roberts, being in prison, makes certain disclosures to the police officers, to the effect that the persons who had been engaged in

(1) 1 C. B. 438. (2) 4 M. & W. 16.

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this robbery were to be found, or might be found or heard of, at a place which he called the eelpie house, in Whitechapel Road. The police officers proceed thither, and ultimately, in consequence of the clue they thus obtained, discovered and apprehended the thieves, who were ultimately convicted.

Now undoubtedly, if it were necessary, in order to entitle any one to recover a reward offered as this was, that there should be but one link in the chain of cause and effect, and if the information given must necessarily be followed by what in truth is the cause, and that must necessarily be followed directly and immediately by the effect, that is, the discovery and apprehension of the real offenders, the facts of this case would not be such as to entitle the plaintiff to the verdict he has obtained. But I see no reason, whether there be one or more links in the chain of cause and effect, so long as there is evidence that the original information given by the plaintiff may have led ultimately, through one or more successive links in the chain of cause and effect, to the ultimate discovery and apprehension of the real offenders, why the person, who gives the original information which is the original cause of the ultimate effect or consequence, the apprehension of the offenders, may not reasonably contend before the jury that the information which he gave led to the apprehension and conviction of the offenders so as to entitle him to the reward in question. And if the jury, on the different facts of the case being properly left to them by the presiding judge, shall, on all the facts, affirm by their verdict that it was the information of the plaintiff which led to the ultimate result, the apprehension and conviction of the offenders, I see no reason why that verdict should not be upheld by the Court.

Now let us see how the present question arose before the jury. It appears to me we have only to look to the language attributed to Blackburn, J., when the case came before the Court of Queen's Bench, to see that a succession of facts proved, and undoubtedly proved in this case, were properly, and in a very distinct manner, left to the consideration of the jury; and upon those facts they found, treating one original information as the immediate cause of that which next followed, and that again as the cause of something which still further followed, that this ultimate result was led to by this original cause.

First, we have the information of the plaintiff, which, I care not which expression we use, "led to" or "caused" the apprehension or imprisonment of Roberts, and then there is the imprisonment of Roberts, which led to or caused the disclosure to the policemen made by Roberts; and there it is the point of difference arises. Now, if we look at the language of my Brother Blackburn himself in the report of this case, it will be seen that he expressly left the question to the jury in its very terms, whether the information given by the plaintiff led to the apprehension and conviction of the thieves, pointing out the remoteness; and after stating the information which had been given by Roberts as to the eelpie shop, and that the offenders had been there discovered, he says the jury found that the information given by Roberts was substantially that on which the police acted. And he further says that they also must be taken to have found that Roberts would not have spoken, or "split," if he had not been in custody; and this circumstance was owing to the information given by the plaintiff.

We have thus the dissenting judge, or the apparently dissenting judge, declaring that the information given by the plaintiff to the defendant, and of this there can be no doubt, led to the imprisonment or custody of Roberts, and the custody of Roberts led to the information Roberts gave to the policemen, which led to the discovery and apprehension of the offenders.

Under these circumstances, it seems to me impossible to contend that on these facts there was not a question for the jury, and the learned judge would have failed in the performance of his duty if he had stopped the case and nonsuited the plaintiff.

If, therefore, the case was to be left to the jury at all, was it properly left as to whether these series of facts fairly considered did not lead to the conclusion that one was the origin and cause of the other, until the original cause, the information given by the plaintiff, terminated in the ultimate result, the discovery and apprehension of the offenders?

I think under the circumstances the case was properly left to the jury; and I must add that the jury found a perfectly proper verdict. It is in accordance with the true merits of the case, and I think it is in furtherance of that public policy under which the

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law applicable to such a case has been expounded in the courts of Westminster Hall. We therefore think the judgment should be affirmed.

WILLES, KEATING, and MONTAGUE SMITH, JJ., and BRAMWELL, CHANNELL, and PIGOTT, BB., concurred.

Judgment affirmed.

Attorney for plaintiff: *W. Newman.*
Attorney for defendant: *W. H. Roberts.*

Jan. 26.

THE QUEEN *v.* THE WYCOMBE RAILWAY COMPANY.

Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *s.* 16—*Highway, diversion of—Parliamentary Plan—Mandamus.*

The defendants constructed, under an act of parliament, a railway which crossed a carriage highway on a level at two places, thereby cutting off on the west a bend in the highway thirty chains in length from the rest of the highway, and made a new road on the east side of the line parallel to it, connecting the two ends of the highway from which the bend was cut off. Under their act they had no special authority to cross this highway on a level, nor to divert it, but on the deposited plan "Proposed Diversion of Road" was shewn in the direction in which the new road was made, and they had power by their act to make the railway on the line delineated upon the plan.

By 8 Vict. c. 20, s. 16: "It shall be lawful for the company, for the purpose of constructing the railway, to . . . . divert or alter, as well temporarily as permanently, the course of any roads, streets, or ways, or sink the level of any such roads &c., in order the more conveniently to carry the same over or under or by the side of the railway as they may think proper":—

Held, that neither the delineation on the plan, without special power in their act, nor s. 16 of 8 Vict. c. 20, authorized the defendants to permanently divert the road; and that, therefore, they were bound by s. 46 to carry the road over the railway, or the railway over the road, by means of a bridge, in order to connect the bend with the rest of the highway.

MANDAMUS, which recited that by 24 & 25 Vict. c. lxxxvii. the defendants had been empowered to make a railway, commencing in the parish of Prince's Risborough, in the county of Buckingham, and terminating in the parish of Aylesbury, in the said county; and the line of the railway which has been constructed by the defendants, under the powers of the act, crossed a highway, being a public carriage road leading from Aylesbury to Stoke Mandeville,

in the said county, at a certain part of the highway where such highway bounds certain lands belonging to the Ecclesiastical Commissioners for England, in the parish of Aylesbury, called the Walton Prebendal Farm; and that the Ecclesiastical Commissioners for England had been accustomed to use the public highway as means of access to the lands so belonging to them, and that the defendants had not carried the public highway and road over the railway, or the railway over the public highway and road, by means of a bridge where the line of the railway so crossed the public highway and road, but have there carried the railway across the highway and road on a level. And that the commissioners had demanded and required of the defendants to carry the public highway and road over the railway, or the railway over the public highway and road, by means of a bridge where the line of the railway so crossed the public highway and road, in pursuance of the provisions of the statute in that behalf made and provided, and that the company had refused to comply with such demand and requirement; and commanded the defendants to carry the public highway and road over the railway, or the railway over the public highway and road, by means of a bridge where the line of the railway so crosses the public highway and road.

Return, that before and at the time of the passing of the act referred to, plans and sections of the railway which the defendants were thereby empowered to make, as in the writ mentioned, shewing the lines and levels thereof, with books of reference to the plans containing the names of the owners and lessees, or reputed owners and lessees, and of the occupiers of the lands through which the railway would pass, had been and were, as in the act mentioned, duly deposited with the respective clerks of the peace for the several counties through which respectively it was then proposed and intended that the railway should pass, and that the land which is within alleged to form the part of the public highway and road was and is duly shewn and delineated in and upon the plans, and described in the books of reference, as then forming, as it in fact then did form, part of the public highway and road, and that it was and is also delineated and shewn in and upon the plans, and stated in the books of reference, that in the event of the making and passing of the act, the Wycombe Railway Company proposed

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to make and construct the then intended railway across the land which is alleged to form the part of the public highway and road, and which were then, in fact, part of the public highway and road in the writ mentioned, and also across another part of the public highway and road as it then existed, in such a manner that a certain curve or bend in the public highway and road, as it then existed, of the length of 30 chains, or thereabouts, which then in part so bounded the land belonging to the Ecclesiastical Commissioners for England as within mentioned, would be separated by the then intended railway from the residue of the public highway and road; and that it was and is also delineated and shewn in and upon the plans, and stated in the books of reference, that in the event of the making and passing of the act, the Wycombe Railway Company proposed to alter and divert the course of the public highway and road, as it then existed, at the parts thereof which would be so crossed by the then intended railway, by constructing there for the public use another public highway or road of the same width as the curve or bend parallel to, and by the side of the intended railway, and without the boundary thereof, which, when so constructed, would connect together the two ends or portions of the public highway and road, from which the curve or bend would be so separated by the intended railway, in such a manner that any person either with or without horses, cattle, and carriages might pass and repass upon and along the public highway and road, as and when diverted, to and from the respective ends or termini of the public highway or road, without crossing or passing upon or over the intended line of railway, or any part thereof. And that the defendants afterwards, and after the making and passing of the act, made the proposed railway, being the railway in the writ mentioned in the lines and upon the lands delineated upon the plans and described in the books of reference, and according to the levels described on the sections, and that it then became, and was necessary and proper for the purpose of so making the railway, to enter upon, take, and use the land which was comprised in the parts of the public highway and road, as it then existed, and then and there permanently to divert and alter. And the defendants did then and there, for the purpose aforesaid, and under and by virtue of the powers of the said act of parliament,

and the acts of parliament incorporated therewith, enter upon, take, and use the lands, and permanently divert and alter the then existing course of the public highway and road at the parts thereof, and as and in the manner and for the purpose so shewn and delineated upon the plans and described in the books of reference, and according to the levels described on the sections, and put the same into a permanently substantial condition, equally convenient to the public as the old road before the diversion thereof, and have always suffered and permitted the public to use the diverted or altered public highway and road so constructed by the defendants as aforesaid; and in so altering and diverting the public highway and road, the defendants did as little damage as could be, and have always made, and been ready and willing to make, full satisfaction in the manner provided in and by the act and the acts incorporated therewith to all parties interested for all damage by them sustained by reason of the exercise by them of the powers as aforesaid, and that by reason of the premises, and under the powers and provisions of the said act of parliament, the land over which the railway crosses as within mentioned, and which is alleged to be a part of the public highway and road, had before and at the time of the issuing of the within writ, and at and from the time of the making of the railway, and the diversion of the road, ceased to be any part or portion of the public highway and road; and that at the time of the issuing of the within writ, and at and from the time of the making of the railway, the railway did not, nor does it, cross any public highway or road at the point or spot in the writ mentioned.

Issue was taken on the return.

At the trial before Pollock, C.B., at the summer assizes, 1865, at Aylesbury, a verdict was entered for the defendants, subject to the following case:

5. By section 4 of the Wycombe Railway (Extensions to Oxford and Aylesbury) Act, 1861 (24 & 25 Vict. c. lxxxvii.), the defendants were authorized, among other things, to construct a railway, to be wholly situate in the county of Buckingham, and to commence in the parish of Prince's Risborough, and to terminate in the parish of Aylesbury, passing through, among other places, the parish of Stoke Mandeville.

6. Before the passing of the act the defendants deposited with

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the clerk of the peace for the county of Bucks plans and sections, shewing the lines and levels of the intended railway, with books of reference as in the act mentioned.

7. The defendants constructed a railway commencing in the parish of Prince's Risborough, and terminating in the parish of Aylesbury, and the line of the railway crossed a highway and public carriage road running from Aylesbury to Stoke Mandeville at the points b and a on the deposited plan (a copy of which was attached to the case; see the plan opposite).

8. By reason of the line of railway being so constructed, a curve or bend in the highway on the west side of the railway, of the length of 30 chains or thereabouts, was separated by the line of railway from the rest of the highway or public carriage road, such curve or bend, is shewn on the plan, as lying between the points b and a.

9. The defendants also constructed a road parallel to and by the side of the line of railway, and without the eastern boundary thereof, which road connects together the two ends or portions of the highway or public carriage road from which the curve or bend was so separated by the line of railway. On the deposited plan, in the direction in which this road has been constructed, were dotted lines with the words "proposed diversion of road."

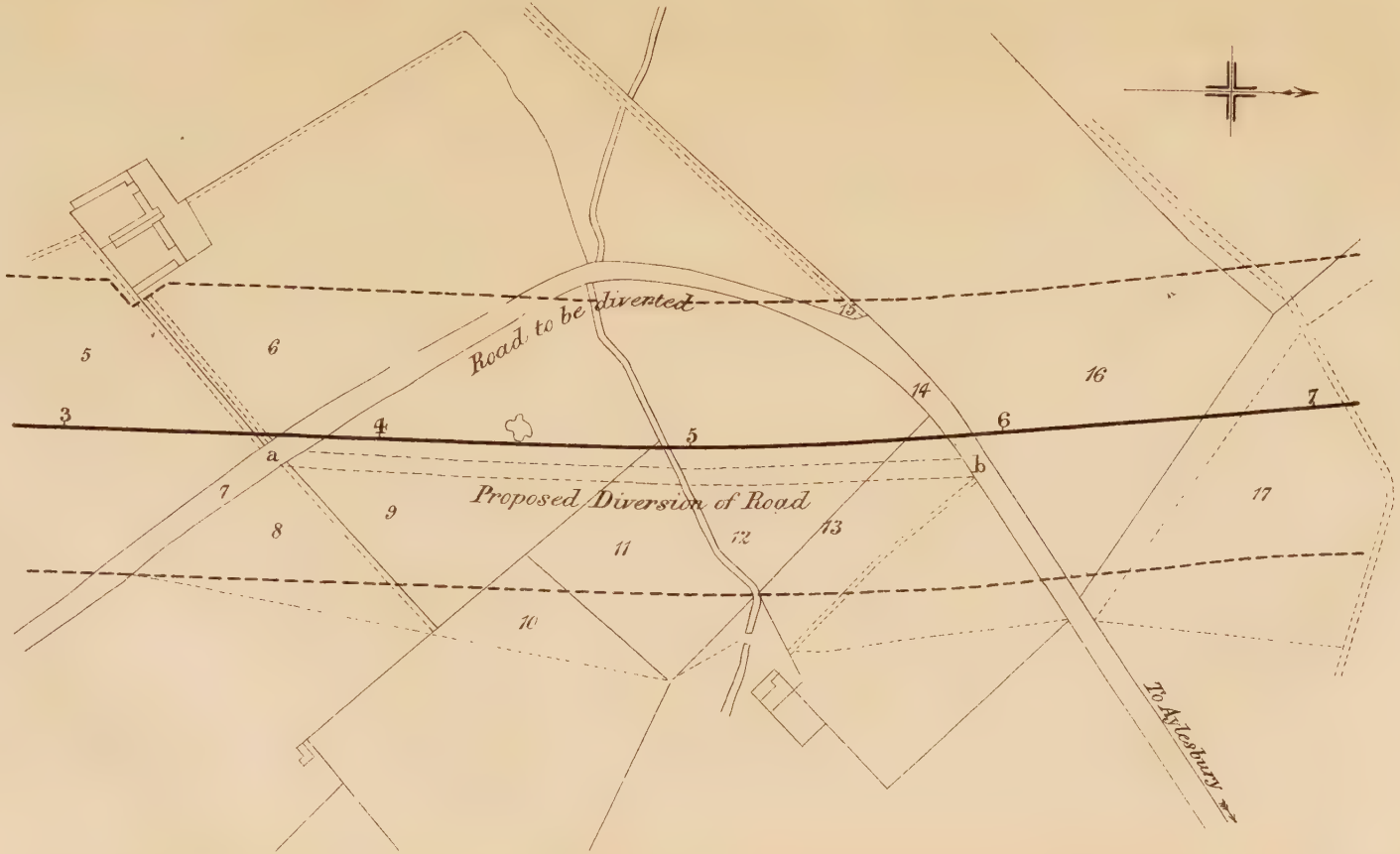
10. The prosecutors are the owners of about 567 acres of land, situate in the parish of Aylesbury, numbered 5, 6, 16, 17 on the deposited plan. Part of their estate, in the occupation of Mr. Fowler, lies on the west of and adjoining to the bend or curve. Another part, in the occupation of Mr. Crouch, lies on the west and east of and adjoining to the line of railway.

11. A public bridle road runs out of the bend or curve at the north-west curve thereof, and is shewn on the plan by dotted lines, commencing from the figures 15 on the plan.

12. There is no other means of access from the public bridle road to the highway and public carriage road lying east of the railway except across the line of railway.

13. The line of railway has been constructed so as to cross the road on the level at the point b.

14. The approaches to the line of railway are in a cutting at point b, the depth of which at the centre of the line of railway


Road to be diverted
Proposed Diversion of Road
To Aylesbury
a
b
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

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is 6 ft. 6 in. The slopes of the excavation of the cutting for the approaches are 1 to 1; the average gradient of the two approaches is 1 in 16. From the point b for about 200 yards towards Aylesbury the line of railway is straight; at that distance from the point b the line of railway passes from a cutting to an embankment of from 3 to 6 feet in height, and at a curve, whose radius is about 16 chains, enters the Aylesbury station.

15. The defendants have not obtained the consent of two or more justices in petty sessions to carry the railway across a highway on the level in the manner provided in ss. 46 and 49 of the Railways Clauses Consolidation Act, 1845.

The questions for the opinion of the Court are, first, whether the facts support the return; secondly, whether on this case the validity of the return is a question for the Court; thirdly, if the validity of the return be a question for the Court, whether the return is valid.

If the Court should be of opinion in the affirmative of all three questions, or in the affirmative on the first and in the negative on the second question, the verdict entered for the defendants is to stand. If the Court should be of opinion in the negative on the first question, or in the affirmative on the first and second questions, and in the negative on the third question, the verdict entered for the defendants is to be set aside, and instead thereof a verdict entered for the prosecution.

Bulwer, Q.C. (*Witt* with him), for the prosecution. The return is not supported by the facts stated in the case. The railway has in fact crossed the old road on a level in two places, and the company have cut off a bend in the highway from the rest of the highway, and made a new road parallel to and by the side of the railway. They contend that they have thereby diverted the highway; for without the consent of justices in petty sessions, which they have not obtained, they have no authority to cross upon a level. But they have no authority to divert either under their private act, 24 & 25 Vict. c. lxxxvii. or under the Railways Clauses Consolidation Act, 1845.

Section 3 of 24 & 25 Vict. c. lxxxvii. (1) empowers the defendants

(1) 24 & 25 Vict. c. lxxxvii. s. 3. "The company may, subject to the provisions of this act, and of the acts incorporated therewith, make and main-

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to make and maintain the railways in the lines and upon the lands delineated upon the said plans, and described in the said books of reference, and according to the levels described on the said sections, and the defendants may take land for that purpose; and no doubt the deposited plan contains a note shewing the intention of the defendants to divert the highway; but it has been expressly decided in *Attorney General* v. *Great Northern Railway Company* (1) that the deposited plans and sections confer no authority to divert a road; they are binding only to the extent of determining the datum line, and the line of railway measured with reference to that datum line, but not with reference to the surface levels of the lands: *North British Railway Company* v. *Tod* (2); *Beardmer* v. *London and North Western Railway Company.* (3) Section 6 authorizes the defendants to carry the railway across and upon a level of the public roads numbered 12 and 15 on the deposited plans; no mention is made of the road in question, and the maxim expressio unius est exclusio alterius applies. There is therefore no power under the special act enabling the defendants to divert this road, or to cross it on a level; neither can they do so under the Railways Clauses Consolidation Act. Section 46 of that act provides that if the line of the railway cross any turnpike road or public highway, the road shall be carried over the railway, or the railway shall be carried over the road, by means of a bridge. The defendants say we have not crossed the road; we have diverted it. The two material sections therefore are ss. 16 and 56. Section 16 (4) provides that the company, for the purpose of constructing the railway, may,

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tain the railways in the lines and upon the lands delineated upon the plans and described in the books of reference, and according to the levels described on the sections, and the company may enter upon, take, and use such of the lands as shall be necessary for all or any of such purposes."

s. 6. "Subject to the provisions in this act and in the Railways Clauses Consolidation Act, 1845, contained, it shall be lawful for the company, in the construction of the railways, to carry the same across and upon the level of two public roads numbered 12 and 15 on the deposited plans,"—neither of which were the roads in question.

(1) 4 De Gex & S. 75.

(2) 12 C. & F. 722.

(3) 1 Mac. & G. 112.

(4) Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 16. "Subject to the provisions and restrictions in this and the special act, and any act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith

amongst other things, divert or alter, as well temporarily as permanently, roads, streets, or ways, or raise or sink the level of any such roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper, and do all other acts necessary for making the railway. This section must be read with s. 56, which enacts, "if the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition equally convenient as the former road, or as near thereto as circumstances will allow." Reading these two sections together, it seems clear that if it be *necessary for making* the railway that the road should be diverted, that is, if the intended railway and the road cannot co-exist, then the company may divert the road permanently, but if the road is not in fact destroyed by the railway, then the diversion is only temporary, and the road must be restored to the same condition in which it was before it was interfered with. This construction of these sections seems to be supported by the judgment of Crowder, J., in the case of *Marquis of Salisbury* v. *Great Northern Railway Company*. (1)

Keane, Q.C. (*Merewether* with him), for the defendants. The defendants have power under their acts to make a railway accord-

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hereinafter mentioned, to execute any of the following works:—

. . . . . .

"They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper.

. . . . . .

"They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway. . ."

(1) 5 C. B. (N.S.) at p. 215; 28 L. J. (C.P.) at p. 56.

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ing to the parliamentary plans deposited with the clerk of the peace, and the return alleges that it was necessary and proper, for the purpose of so making the railway, to enter upon, take, and use the said land, which was comprised in the said parts of the said public highway and road, as it then existed, and then and there permanently to divert and alter the same. Section 16 of the Railways Clauses Act allows the company to divert a road permanently or temporarily, as they may think proper, and also to do all other acts necessary for making the railway. If, therefore, the company think fit to divert this road because it is convenient, or by reason of its being less expensive than to make bridges, or because it is necessary for the purpose of making the railway, they are at liberty to divert it. The diversion of the old road amounted to an extinction of that highway: *Marquis of Salisbury* v. *Great Northern Railway Company*. (1) In *Phillips* v. *London, Brighton, and South Coast Railway Company* (2), Stuart, V.C., refused an injunction to restrain a diversion of a highway, save for a temporary purpose, on the ground that s. 16 authorized a permanent diversion. The diversion of the road is marked on the deposited plan, and the plan and books of reference would be before the legislature when the special act for constructing the railway was passed, and the road has been diverted according to that plan, and the powers of the special act: *Abraham* v. *Great Northern Railway Company*. (3) He also referred to *Eton College* v. *Great Western Railway Company* (4); *Sadd* v. *Maldon, Witham, and Braintree Railway Company*. (5)

Bulwer, Q.C., was heard in reply.

COCKBURN, C.J. I am of opinion that the judgment of the Court should be for the Crown. Upon the facts as found, and upon the true construction of s. 16 of the Railways Clauses Consolidation Act and the special act, taken together, I am of opinion that the return to the mandamus is not true in fact, and is bad in point of law. In the first place it was contended on the part of the defendants, that inasmuch as they had marked upon

(1) 5 C. B. (N.S.) 174; 28 L. J. (C.P.) 40.
(2) 4 Giff. 46.
(3) 16 Q. B. 586.
(4) 1 Railway Cases, 200.
(5) 6 Ex. 143.

the plans submitted to parliament the diversion of the road, and afterwards by their special act obtained powers to construct the railway according to the plans and sections deposited, that they thereby acquired a right to divert the road. Both upon principle and upon the authority of the case cited for the prosecution, *Attorney General* v. *Great Northern Railway Company* (1), I am of opinion that they did not acquire this right. We all know that the plans and sections are required by parliament to be deposited, in order that the levels of the line and the course it takes in various places may be known and ascertained; but where there is an intention on the part of a company to interfere with private rights, it is necessary that the company, if they desire to obtain such powers, should give express notice to the parties, and they must obtain an express enactment conferring such powers upon them, in which case provision is made for compensation to be paid to those persons whose rights are interfered with. The powers for the construction of a railway conferred on a company by their special act are subject to s. 16 of the Railways Clauses Consolidation Act, which empowers them "to divert or alter, as well temporarily as permanently, streets or roads or ways, or sink the level of them, in order the more conveniently to carry the same over or under, or by the side of the railway, as they may think proper." Now if these words stood alone, it might be contended, that it was at the option of the company to divert a road, provided it was done in the construction of the railway. But I think the legislature never could have intended to invest a company with powers so large, so unlimited, and so entirely discretionary, to interfere with either public or private rights, therefore I am not surprised that both at the beginning and at the end of the section the language plainly shews that the legislature intended to limit the power by some qualification. The section begins thus: "Subject to the provisions and restrictions of this and the special act, and any act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith," to execute any of the following works; and inter alia, to divert roads, I think that this portion of the section must be read with the last paragraph: "they may do

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(1) 4 De Gex & S. 75.

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all other acts *necessary for making*, maintaining, altering, or repairing and using the railway." Now the interpretation that I put upon the whole section is, that the power conferred on a railway company for the construction of their railroad, is confined to matters which are not only done in the construction of the railway, but which are necessary to its construction. I would observe that unless that restriction and limitation is put upon the enactment the company might have taken a street in a crowded town, or they might have taken a road with two termini which were distant several miles from each other, and because it suited their convenience they might have shut up all access to the street, which might be in the shape of a crescent, or they might between those two distant termini of the road, divert and alter it and cross it on a level, and inflict the greatest possible amount of inconvenience and annoyance to the owners of property between these termini. Such a construction would lead to most inconvenient results, and be attended with the greatest possible mischief. I do not conceive that the legislature ever intended to confer such powers, and that the clause must receive a limited construction.

Then comes the question whether the diversion of this road was necessary for the construction of the railway. Mr. Keane contended at first that it was necessary for the construction of the railway, because it was incumbent upon the company to construct the railway according to the plan, and this diversion had been marked upon the plan; he did not with much force press this argument, and he ultimately gave it up. I am of opinion that it was entitled to no weight. The question is, was the diversion necessary for the formation and construction of the railway? Necessary it was perhaps in one sense, looking at the convenience of the company economically, but by no means necessary in any other point of view. But we are not to look at the convenience of the company alone, but to the accommodation and convenience of those who have rights of property which are interfered with, of those who have immediate access to the road, or persons using it of necessity in the ordinary course of their business. It was not necessary for the construction of the railway that the road should have been permanently diverted, it might have been carried over the railway or under it; it was merely less expensive to the com-

pany to divert the road as they have done, than to carry it over or under as they ought to have done, and as required by the act of parliament. I think that this return is bad. It alleges that it was necessary, for the purpose of constructing the railway, that the road should be diverted, and that by virtue of the powers of their act, and the acts incorporated therewith, they did permanently divert the road. The question whether that is true or not, turns entirely upon the construction to be put upon the term "necessary," in s. 16. I think the meaning we ought to give to the word is, that it is only necessary for the construction of the railway to permanently divert the road when the railway cannot be made without so diverting it. If that is the proper construction, the return is not made out, and our judgment must be for the Crown.

BLACKBURN, J. I am of the same opinion. The railway company could not divert the road except so far as some statute enabled them to do so. If the piece of road in question is still an existing road, the company have crossed the road; and as they are not authorized to cross the road on a level, they are bound by s. 46 to carry the road over the railway, or the railway over the road, by means of a bridge. This is what the mandamus requires should be done. The return sets out the facts, by which it is attempted to shew that the defendants were authorized to stop up the road, and to make a new road where they have diverted the original road. Now, are the company in fact authorized to do this? Upon the deposited plans, to which reference is made generally in the special act, the company have very clearly pointed out their intention to divert the road, and they have marked by a dotted line the proposed direction in which the portion of the road is to be diverted. So, no doubt, upon the face of the plan they have clearly pointed out their intention to divert the road; and if they had followed out that intention by obtaining a clause to that effect in the special act, no doubt they would have been authorized to divert the road, subject to such restrictions as might be necessary for the protection of the public. They, however, have obtained no special enactment; and I think, on the authority of the case of *Attorney General* v. *Great Northern Railway*

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Company (1), that a memorandum of an intention to divert a road, however clearly it may be expressed in the deposited plans, does not amount to a parliamentary licence to divert or alter the road, and that therefore the defendants cannot divert or alter this road in the manner they contend they have a right to do.

The other question is a more important one. Does s. 16 of the Railways Clauses Consolidation Act authorize the company to permanently divert the road? It is true that the length of diversion in the present instance is only 30 chains, but if we put the construction contended for by the defendants on this section, and hold that a company at its option has power to divert any road within the limits of deviation, they might do this to any extent, and all the inconvenience to the public pointed out by my Lord would occur.

We must look at the words of s. 16, which authorizes a company, for the purpose of making the railway, amongst other things, "to alter the course of any rivers not navigable, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under, or by the side of the railway, as they may think proper." No doubt the defendants have in one sense diverted the road for the purpose of carrying it alongside of the railway; but to hold that they have power to do this in their discretion would be to entrust them with too extensive powers; and therefore I think these words must receive a limited construction; and I think the fair construction is, reddendo singula singulis, that where the railway is to cross the line of an old road, the company may divert the road or street in order the more conveniently to carry it over or under the railway, but they cannot permanently stop up the road; but where a railway has power to take a part of the road, as was the case in *Marquis of Salisbury* v. *Great Northern Railway Company* (2), and a part of the road has to be diverted, the company may permanently divert it by carrying the same alongside of the railway. Here the defendants have made a far more extensive diversion. The railway crosses the road, and after passing some distance out of the limits of deviation re-crosses

(1) 4 De Gex & S. 75. (2) 5 C. B. (N.S.) 174; 28 L. J. (C. P.) 40.

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it; and the defendants, instead of making bridges at these two crossings, have diverted the road by making a new road running by the side of the railway; this is a diversion which they are not authorized by this section to make. If it was the defendants' intention to divert the road in the manner in which they have diverted it, they ought to have given the proper notices, and have obtained the insertion of a clause in their special act giving them this power.

Then the remaining question is, what is the effect of the return? I think, construing s. 16 as I have construed it, the allegation that the defendants did, under the powers of their act, and of the acts of parliament incorporated therewith, permanently divert the road, is not true. What they have done is not such a diversion as on the return would make it good. In substance the return is disproved, and I think therefore our judgment should be for the Crown.

MELLOR, J. I think the return is not supported by the facts, and I agree in the construction put upon s. 16 of the Railways Clauses Consolidation Act, by my Lord and my Brother Blackburn. The defendants have no power under their special act to divert the road; and upon the authority of the case which has been cited, *Attorney General* v. *Great Northern Railway Company* (1)—and I should have come to the same conclusion independently of that authority—it seems to me that the memorandum on the deposited plan amounted to nothing more than an indication of what the defendants proposed to obtain power to do. It neither became obligatory on the defendants to follow the plan, nor was it the foundation of any authority conferred upon them.

The defendants must therefore rely on s. 16; but the powers conferred on railway companies by that section are for the purpose of constructing the railway; they may divert or alter, temporarily or permanently, roads; or they may alter the level of a road in order the more conveniently to carry the same over or under, or by the side of the railway, as they may think proper. No doubt a certain discretion is allowed them, but it was never intended to confer upon a railway company the power of permanently divert-

(1) 4 De Gex & S. 75.

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ing or altering a road merely because it was convenient to themselves, or because it was for their interest to do so. They have a discretion only to judge for themselves, whether they will alter the level of a road or divert the road, if it was necessary to do so for the purpose of the construction of the railway, and then they may carry it over or under the railway. The defendants in the present case have gone beyond the limits of the authority conferred upon them. It is impossible to suppose that without a special authority in their act they can at their pleasure divert a road for any other purpose than the construction of the railway. Without any difficulty, mechanical or physical, but at a little extra cost, the defendants might have crossed and re-crossed the road. I find nothing in any of the acts which enables the defendants to divert a road simply upon the ground of economy.

LUSH, J. I am of the same opinion. The first question is, whether the defendants have power conferred upon them to do more than what is authorized by the provisions of the general act applicable to all railway companies? Now, in the plan which the defendants laid before parliament preparatory to applying for their bill, they marked against the road in question the proposed diversion, and put in the words "proposed diversion of road." Then it was contended that because the plan contained those words, and s. 3 of the special act must be taken to authorize them to do all they propose to do, as laid down upon their plan, they were authorized to make this diversion. The words of the section are: "The company may, subject to the provisions of this act, and of the acts incorporated therewith, make and maintain the railways in the lines and upon the lands delineated upon the plans, and described in the books of reference, and according to the levels described on the sections." The defendants may do all they state on the plan they wish or propose to do, for they may make the railway on the lines and upon the lands, and according to the levels described upon the plan, and they must do this subject to the provisions of the general act, coupled with the sanction of parliament given them by the special act. The plan does no more than describe the line within the limits of deviation. The words on the plan are "proposed diversion," and the defendants proposed

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to divert the road in a manner which parliament has not thought fit to sanction.

That throws us back on the general act. Then what are the provisions of that act? Does s. 16 authorize the diversion in question? It says "that it shall be lawful for the company, for the purpose of constructing the railway, to divert or alter rivers, roads, streets, or ways . . . . and to do all other acts necessary for making, maintaining, or repairing, and using the railway." Obviously the sanction of parliament to the diversion of public streets, roads, and ways, is conditional upon its being necessary for the purpose of constructing the railway; and it never was intended to give to railway companies power arbitrarily to divert rivers, roads, streets, or ways, merely for the purpose of saving them the expense of building bridges over the railway. I read the words "for the purpose of the construction of the railway" as importing this,—when the railway is to interfere with a public road or street or river, so that the two cannot be used together, one must give way to the other; and then they have power to make such "diversions or alterations in the roads, streets, or rivers, as may be necessary, in order the more conveniently to carry the same over or under, or by the side of the railway, as they may think proper." Having power to divert or alter, they have the choice of doing it either by carrying it over or under, or by the side of the railway; but that is only conditional on its being necessary to do it for the purpose of constructing the railway. There is not a word in the section intimating that they have this power merely in order that they may construct the railway more economically, or save expense to the company.

I am therefore of opinion that the diversion the defendants have made is altogether unauthorized, either by the general or the special act. I also agree with the other members of the Court that the return, if good in point of form, is disproved by the evidence. Our judgment must therefore be for the Crown.

Judgment for the Crown.

Attorneys for prosecutors: *White, Borrett, & White.*
Attorneys for defendants: *Baxter, Rose, Norton, & Co.*

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SMITH and Others *v.* BLAKEY.

Evidence—Entry by Deceased Person against Interest, or in course of Business—Account Sales.

It was the duty of a confidential clerk, who managed a branch business of the plaintiffs, as general merchants, to keep them duly advised of all business transacted; in discharge of this duty, he wrote them a letter, stating that the defendant had sent three cases to the office, and giving details of the transaction under which they were sent:—

Held, that this letter was not admissible in evidence against the defendant after the clerk's death, as it was neither a declaration against direct pecuniary interest, nor an entry made in the discharge of a duty to do a particular act and make a record of it.

Quære, whether, where goods are consigned to an agent in England for shipment and sale in a distant country, it may not be taken as an implied term of the agreement by the consignor, that the account sales rendered by the agent's correspondent abroad shall be good primâ facie evidence of the amount realized by the sale?

Declaration for money lent, money paid, work done and commission, money had and received, interest, and on accounts stated.

Plea, never indebted.

Issue thereon.

At the trial before Mellor, J., at the sittings in Middlesex after Easter Term, 1866, it appeared that the action was brought to recover 97*l.* 18*s.* 3*d.*, the balance, with interest, due, as was alleged, on an advance by the plaintiffs to the defendant, on a consignment of boots and shoes. The plaintiffs in 1864 were general merchants, having a house in London, Liverpool, and Calcutta. The plaintiff Smith managed the business in London, and the business in Liverpool was carried on by a confidential clerk, named Barker, whose duty and practice it was to keep his principals constantly advised of all the business he transacted for them. The defendant was a boot and shoe manufacturer in Liverpool. Barker died in August, 1864; and, in order to prove the alleged transaction between the plaintiffs and the defendant, a letter written by Barker to the plaintiff Smith on the 5th of April, 1864, was tendered in evidence, and admitted, after objection. The letter was as follows:—

"James Smith, Esq., London. April 5, 1864.

DEAR SIR,—I enclose four private letters, also two drafts of Cuming, Brothers. . . . Draft of John Blakey [the defendant] which he sent to-day, with three huge cases, to the office. I enclose his invoices for your perusal. He leaves shipment of his goods to your judgment. He will renew; he banks with the North and South Wales Bank here. I think the goods are remarkably cheap, and I consider him a perfectly safe man, should there be any reclamation. He draws for 75 per cent.; and will pay me the 20*l.* he owes you, which it was arranged you should take out in ponies; this I stipulated for. I have a sample pair of each description here, which we can send out by first ship, and keep the goods for the *Lady Palmerston*, which vessel arrived yesterday from Glasgow. . . . .

Yours, &c.,

Geo. C. Barker."

The invoices inclosed were one to each case of boots and shoes, and were on lithographed forms of the defendant, headed "Mr. . . . bought of J. Blakey," no name being inserted as buyer; and the list of boots and shoes, with prices, was made out in the handwriting of one of the defendant's clerks.

The draft was a bill of exchange, dated April 5, 1864, at six months, drawn by the defendant to his own order on the plaintiffs, for 252*l.* 7*s.* 5*d.*, "value received," this amount being about 75*l.* per cent. on the aggregate invoice prices.

The plaintiffs accepted this bill, and returned it to the defendant, and paid it at maturity.

Two of the cases were consigned for sale to the plaintiffs' house at Calcutta, and one to their agents at Columbo, in Ceylon; and on the account sales returned to the plaintiffs by their correspondents, and which were put in evidence, the net proceeds of the sale of the three cases shewed a deficit below the sum advanced by the plaintiffs, which deficit, with interest, made up the sum claimed.

A clerk of the plaintiffs stated that when the bill was due in October, 1864, he called on the defendant and asked for a renewal of the bill, or payment of the balance due on the current account, but the defendant repudiated any liability, on the ground

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that the transaction between him and Barker on behalf of the plaintiffs was, that the defendant was to draw for any balance in his favour after the proceeds had been realized, and if there was any deficiency the plaintiffs were to bear the loss. In March, 1865, the account of the sales in Calcutta was sent to the defendant; and in March, 1866, the account of the sales in Ceylon; but the defendant took no notice of either.

At the close of the plaintiffs' case the defendant's counsel claimed a nonsuit, on the ground that there was no evidence of the amount due to the plaintiffs, as the account sales were no evidence of the amount which the goods realized. The learned judge refused to nonsuit, but gave leave to the defendant to move.

The defendant's counsel upon this called evidence, and the defendant and his clerk contradicted the evidence given by the plaintiffs' clerk, and swore that the transaction entered into by the defendant with Barker on behalf of the plaintiffs was a sale to them on the terms of 75*l.* per cent. of the price being paid in cash. But the defendant was unable to account for not having applied to the plaintiffs for the balance of the price.

The jury found a verdict for the amount claimed.

A rule was obtained to enter a nonsuit, on the ground that there was no evidence to go to the jury; or for a new trial, on the ground that Barker's letter ought not to have been admitted in evidence.

J. Brown, Q.C., and *Murphy*, shewed cause. There is no ground for a nonsuit or new trial. The chief question is, whether the letter written by Barker was admissible. It was admissible on two or three grounds. First, as the defendant's original invoices and bill of exchange were transmitted in it, it may be said to be part of the res gestæ.

[BLACKBURN, J. It cannot be put so high as that. The letter clearly would not have been admissible if Barker had been alive.]

Then it was admissible as an entry by a deceased person in the performance of his duty to his employers in the ordinary course of business. Thus in *Doe* v. *Turford* (1) the indorsement

(1) 3 B. & Ad. 890, 896.

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on the back of a duplicate notice by a deceased attorney that he had served a notice to quit, with the date of service, it being the practice of the office to make such an indorsement, was held evidence against the tenant; and Parke, J., says: "It is not the matter contained in the written entry simply which is admissible, but the fact that an entry containing such matter was made at the time it purports to bear date, and when in the ordinary course of business such an entry would be made if the principal fact to be proved had really taken place."

[LUSH, J. In that case, and all the cases in which such declarations have been admitted, it was the duty of the deceased not only to do the act, but to make an entry or record of having done it, and this was the principle of the leading case of *Price* v. *Earl of Torrington.* (1)]

The principle is equally applicable to a record in a letter which it is the duty of the deceased to send as to an entry in the employers' books, which was the case in *Price* v. *Earl of Torrington.*(1)

[MELLOR, J. In *Stapylton* v. *Clough* (2) Lord Campbell, after saying that he adhered to the opinion he had expressed in the *Sussex Peerage Case* (3), that any declaration of a deceased person, whether verbal or written, made in the discharge of a duty, was admissible, goes on to shew that that does not extend to admitting declarations about the business made afterwards.

BLACKBURN, J. The principle, extended as far as now contended for, would go to admit a letter of advice of a deceased commercial traveller, stating what orders he had received, as evidence against the customer. No one ever heard of an attempt to put such a letter in evidence.]

No doubt it is not every entry made in the course of business which is admissible, as was held in *Reg.* v. *Worth* (4), where there was no duty shewn toward a third person to make the entry; but nothing could be more strictly within Barker's duty than the present entry.

[LUSH, J. In *Bright* v. *Legerton* (5), Lord Campbell, C., in overruling the decision of the Master of the Rolls, pointed out that the

(1) 1 Salk. 285; 2 Ld. Raym. 873; 1 Sm. L. C. 6th ed. 290.

(2) 2 E. & B. at p. 937; 23 L. J. (Q.B.) at p. 6. 17 Jun 61

(3) 11 Cl. & F. at p. 113.

(4) 4 Q. B. 132.

(5) 30 L. J. (Ch.) 338, 341; 2 De G. F. & J. 606, 614, 7 Jun 61 555, 586

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declaration must be proved to have been made in the course of a duty shewn to exist aliunde.]

Here the plaintiffs shewed aliunde that some contract was made on the day the letter was written. In *Stapylton* v. *Clough* (1), the declaration was rejected as not having been made in the ordinary course of duty; and the same point arose in *Edie* v. *Kingsford*. (2) See also Best on Evidence, 4th ed. 629. But if the letter is not admissible on this ground, it is admissible as a declaration against interest, as Barker charges himself with the receipt of the three cases of goods; and if this be against interest, then the whole entry is admissible to prove the nature of the transaction: Taylor on Evidence, ss. 602, 603, citing *Crease* v. *Barrett*. (3)

[BLACKBURN, J. No doubt, if any part of the entry is against interest, the whole is admissible in evidence, as was held in the well-known case of *Higham* v. *Ridgway*. (4)]

Lastly, it is objected that there was no evidence of the amount due to the plaintiffs, because the account sales were not legal evidence of the amount which the goods realized in India, and therefore that there ought to have been a nonsuit. But this was an advance made on the collateral security of the consignment, and as soon as the bill had been paid, there became a debt for money lent, and the plaintiffs could sue for the whole of their advance, and it was for the defendant to cut the demand down by showing what amount the plaintiffs had repaid themselves. There was no evidence that the contract was, that the plaintiffs should look to the proceeds of the sale in the first instance, and only hold the defendant liable for the balance.

Pope, in support of the rule. To admit this letter, as an entry made in the due course of business and in discharge of a duty, would be materially to extend the doctrine of *Price* v. *Earl of Torrington* (5), which it has been said more than once by learned judges ought not to be done: per Lord Abinger, C.B., in *Brain* v. *Preece*. (6) *Doe* v. *Turford* (7), and *Poole* v. *Dicas* (8) go no further than *Price* v. *Earl of Torrington* (5), the entry in each being one

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(1) 2 E. & B. 933; 23 L. J. (Q.B.) 5.
(2) 14 C. B. 759; 23 L. J. (C.P.) 123.
(3) 1 C. M. & R. 919.
(4) 10 East, 109.
(5) 1 Salk. 285; 2 Ld. Raym. 873.
(6) 11 M. & W. at p. 775.
(7) 3 B. & Ad. 890.
(8) 1 Bing. N. C. 649.

which it was the duty of the deceased to make. And in *Chambers* v. *Bernasconi* (1), that part of the entry which it was the duty of the deceased to make would have been held admissible, but the other part though made at the same time was rejected. Phillips on Evidence, 8th ed. p. 333, 10th ed. 281, is to the same effect. Here the duty of Barker, if any, was completed when he had made the contract; and informing his employers of what he had done is no part of his duty within the rule. As is pointed out by Alderson, B., in *Doe* v. *Langfield* (2), the duty must not vary from time to time.

[BLACKBURN, J. As my Brother Lush says, there must be a duty to do a particular act and register it.]

Secondly, the letter was not admissible as against interest. Possibly, Barker may be said to charge himself with the care of the cases; but the admission must be directly against pecuniary or proprietary interest: Taylor on Evidence, s. 604, citing *The Sussex Peerage Case.* (3) Lastly, the contract, if any, was a contract by which the plaintiffs agreed to look to the proceeds of the goods in the first instance, to recoup themselves pro tanto; and no obligation on the defendant to pay anything could therefore arise until the plaintiffs shewed what amount the goods realized; and of this there was no legal evidence; therefore the plaintiffs ought to have been nonsuited.

BLACKBURN, J. The first question is, was the letter of the 5th of April, 1864, written by Barker to the plaintiffs admissible in evidence against the defendant? Mr. Barker was employed by the plaintiffs as confidential agent in Liverpool to carry on their business there; and part of his duty, part of what he was employed to do, was to keep his principals advised of the business transacted by him, and he did keep them so advised. Of course, as long as Barker lived this letter would not have been evidence, and he must have been himself called as a witness; but Barker is dead, and it was sought to make the letter admissible, as coming within the class of cases in which statements, whereby a deceased person has charged himself with or discharged another from the payment of money, have been admitted. And no doubt when entries are against the pecuniary interest of the person making them, and

(1) 1 C. M. & R. 347. (2) 16 M. & W. at p. 508.
(3) 11 Cl. & F. 103, 114.

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never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them, as evidence against third persons, not merely of the precise fact which is against interest, but of all matters involved in or knit up with the statement; as in *Higham* v. *Ridgway* (1), where the entry of a man midwife that he had delivered the wife of a certain man of a son on a particular day, coupled with the charges which were marked as paid, was held admissible to prove the date of the birth of a person who had suffered a recovery, shewing that he was not of age at the time. The present statement is contained in a letter which acknowledges the receipt of "three huge cases," and if this acknowledgment is receivable in evidence as against interest, then the rest of the letter explanatory of the transaction under which the cases were received would also be evidence. But the authorities shew, as was said in the *Sussex Peerage Case* (2), that the declaration must be against pecuniary interest, or, what is much the same thing, against proprietary interest, as when a deceased occupier of land admitted that he held as tenant of another, thus cutting down his primâ facie title in fee. In the present case all the admission by Barker that can be said to be against interest amounts to no more than an admission that he has the care of the three chests which have arrived at the office, and the possibility that this statement might make him liable in the case of their being lost is an interest of too remote a nature to make the statement admissible in evidence.

Then it is said, if not a statement against interest, the letter is admissible as a memorandum made in the course of business and in the discharge of a duty to Barker's principals. But the rule as to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do, and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. A strong instance of the distinction is the case of *Chambers* v. *Bernasconi* (3) in the Exchequer Chamber. The reason of the distinction is not at first sight very obvious; but I think all the cases shew that it is an essential fact to render such an entry

(1) 10 East, 109. (2) 11 Cl. & F. 85. (3) 1 C. M. & R. 347.

admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it.

Thus in *Price* v. *Earl of Torrington* (1) it was the duty of the drayman to deliver the beer and enter it in the book; in *Poole* v. *Dicas* (2) it was the duty of the clerk to present the bill and make an entry of the dishonour; and in *Doe* v. *Turford* (3) it was the duty of the person to serve the particular notice and make an indorsement of the service. In the last case Parke, J., points out that an entry in the course of business to be admissible must be made at the very time of the transaction, whereas an entry against interest may be made at any time; and this explains the distinction: if the nature of the duty must be to do a particular act and make a record of it at once, the time at which the entry is made is of great consequence, and goes to the essence of the admissibility, which is confined to the matters which it is the duty to record. It at once follows that the present statement was not admissible, and ought not to have been received. Consequently the verdict cannot stand; and the remaining question is, whether there ought to be a nonsuit or only a new trial. I think the rule ought to be for a new trial only; as there was evidence in support of the plaintiffs' case, without the letter: the invoices and the bill of exchange, coupled with the defendant's own conduct, would be evidence on which the jury might find for the plaintiffs.

As to the other ground on which the defendant's counsel contended that there ought to have been a nonsuit, viz. that the plaintiffs made out no case, as they could not recover unless they made out affirmatively what were the proceeds of the sale by strict legal evidence, and that the account sales were no evidence of this as against the defendant. To this there are two answers: first, upon a contract such as a mortgage, or an advance with an assignment as collateral security, whatever rights the parties may have in equity, the mortgagee or lender may at law sue for his whole advance, and is not obliged to give credit for any amount that he has received or realized, but may leave the defendant to cut down the claim; and it was for

(1) 1 Salk. 285; 2 Ld. Raym. 873. (2) 1 Bing. N. C. 649.
(3) 3 B. & Ad. 890, 896—8.

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the jury to say whether the present was an advance of this description, and not the more unusual one, that recourse was first to be had to the proceeds of the security. The second answer is, that where there is a consignment of goods which are to be sent to a distant country for sale, it may well be that there is an implied agreement by the consignor that the account sales sent from abroad shall be good primâ facie evidence of the amount of the proceeds, until the contrary be shewn: leaving it open to the consignor to "surcharge and falsify," as the phrase is in equity. I do not at present say positively this is so, but it might possibly be maintained.

MELLOR, J. I am of the same opinion. Upon the latter points I wish to add nothing. It is with some reluctance that I have come to the conclusion that the letter was not admissible in evidence, because there can be no doubt in anybody's mind on reading it that the contract was as the plaintiffs allege. But when we consider that the law jealously guards against statements made behind the back of a party being admissible against him, we must take care how we enlarge the exceptions to the general rule against hearsay evidence. The exceptions are only two: an entry or admission against the interest of a deceased person, and an entry made in the course of duty. As to the first, that is confined expressly, as pointed out by Lord Campbell in the *Sussex Peerage Case* (1), to an entry against interest in a pecuniary point of view: the present letter does not therefore come within that exception. As to an entry in the course of duty, that must be made contemporaneously with the act done, and there must be a duty to do the particular act and at once to make a record of it. The present case does not fall within the exception. It was the duty of Barker to communicate all transactions to his principals, and keep them advised of all that he had done; and the letter was written in the performance of that general duty; but it is not a record of having done a particular duty within the cases which have established the exception. If we were to hold this letter admissible, I do not know where the limit is to be put; but all letters and correspondence between principals and their agents might become admissible against third persons.

(1) 11 Cl. & F. at p. 113.

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LUSH, J. I am of the same opinion. We ought to be extremely cautious how we extend the exception which makes hearsay evidence against third persons. The general rule is that evidence ought to be on oath, and subject to cross-examination by the person against whom it is given. The admissibility of declarations by deceased persons is limited to a very few cases. And when an entry is said to be admissible, as made in the course of duty, it is not meant that every entry or statement which it is the duty of the deceased to make can be used in evidence against third persons; but the exception is limited to the case in which it was the duty of the deceased to do a particular thing and to record the fact of having done it. In the present case, Barker had no specific duty to perform, but it was his duty to do his best for his employers and to keep them advised; and to extend the exception to such a case as the present would be most dangerous. If this letter were admissible, it would follow that every commercial traveller, who writes to his principals that he has received orders from different customers, might enable his principals, in the event of his death, to charge every one mentioned in his letters. There is nothing in the cases justifying such an extension of the rule, and the letter was clearly inadmissible.

As to the admissibility of the account sales, I am by no means prepared to say that, when a merchant consigns goods to be disposed of in foreign markets, he does not impliedly agree that the account sales, furnished by the correspondents abroad, shall be taken as primâ facie evidence of what the goods realized: because otherwise it would compel the procuring evidence from abroad at great expense. And it is well known that, in practice, merchants are satisfied with the truth of the account sales, and ask for no further evidence.

Rule absolute for a new trial.

Attorneys for plaintiffs: *Stibbard & Beck.*

Attorneys for defendant: *Wilkins & Blyth, for Marsland & Addleshaw, Manchester.*

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February 9.

THE QUEEN *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Sheriff—Disqualifying Interest—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 39.

The interest which at common law disqualifies an officer from acting in a judicial inquiry must be direct and certain, and not merely remote or contingent; and the same principle must be applied to s. 39 of the Lands Clauses Consolidation Act.

Where, therefore, at the time of the summoning of a jury and the taking of an inquisition before the sheriff as to the amount of compensation to be paid for land taken by a railway company under the powers of their act of parliament, there was an executory agreement not yet carried out, by which that company would ultimately become amalgamated with another railway company, and the sheriff was a shareholder in the latter company:—

Held, that the sheriff was not "interested in the matter in dispute" within the above section, so as to invalidate the proceedings.

THIS was a rule calling on the Manchester, Sheffield, and Lincolnshire Railway Company to shew cause why a writ of certiorari should not issue to bring up a warrant issued by the company to the sheriff of Lancashire, and an inquisition, verdict, and judgment taken before the sheriff, touching the claim to compensation made by the Earl of Sefton against the Manchester, Sheffield, and Lincolnshire Railway Company, in respect of his interest in certain lands having been injuriously affected by the execution of the works of the company, for the purpose of quashing them, on the ground that the sheriff was interested in the matter in dispute within section 39 of the Lands Clauses Consolidation Act, 1845. (1)

January 31. *J. A. Russell*, and *John Edwards*, shewed cause. *Mellish*, Q.C., and *Littler*, in support of the rule.

The facts, as disclosed in the affidavits, and the argument of counsel sufficiently appear in the judgment of the Court.

Cur. adv. vult.

(1) s. 39 of the Lands Clauses Consolidation Act (8 Vict. c. 18), provides that in questions of disputed compensation to be determined by the verdict of a jury, the promoters of the undertaking shall issue their warrant to the sheriff to summon a jury for that purpose; "and if such sheriff" be interested in the matter in dispute, such application shall be made to some coroner of the county in which the lands in question, or some part thereof, shall be situate.

Feb. 9. The judgment of the Court (Mellor, Shee, and Lush, JJ.) was delivered by

MELLOR, J. In this case a rule had been obtained, on the part of the Earl of Sefton, to remove into this Court a warrant issued by the Manchester, Sheffield, and Lincolnshire Railway Company, dated the 17th of July, 1866, and a certain inquisition, verdict, and judgment taken before the sheriff of the county of Lancaster on or about the 2nd day of August, 1866, touching his claim to compensation in respect of his interest in certain lands having been injuriously affected by the execution of the works of the said company, on the ground that the sheriff of the said county "was interested in the matter in dispute."

The sheriff, in point of fact, did not interfere in the matter at all, and was unaware that any such warrant had been issued or any such inquisition held. The under-sheriff had summoned the jury in the ordinary course, and an assessor of standing and experience at the bar had presided over the inquiry. As far as appears, the inquiry was thoroughly impartial, but the result of the verdict did not satisfy the expectations of Lord Sefton and his advisers.

The circumstances were these:—The Manchester, Sheffield, and Lincolnshire Railway Company were authorized by an act passed in 1865 (1) to construct a new line of railway between Manchester and the manufacturing districts and Liverpool; and under that act the usual proceedings had been taken to acquire for the purposes of the line a portion of the property of the Earl of Sefton, and failing to come to an agreement with him as to the amount of compensation to which he was entitled, the company had in due course issued their warrant to the sheriff, on the 17th of July, 1866, to summon a jury of the county of Lancaster to assess the amount of such compensation.

Unfortunately, on the 16th of July, 1866, the day before such warrant was issued, an act of parliament (2) had received the

(1) 28 & 29 Vict. c. ccclxxviii.

(2) 29 & 30 Vict. c. cxci. The following sections are material:—s. 4. "Within three months after the passing of this act the Sheffield Company shall deliver to the Great Northern and Midland Companies (hereafter called the two companies) an account of all payments made by them for or in respect of the undertaking, and of all liabilities incurred in respect thereof, and the said account shall be verified by a declaration under the seal of the Sheffield Company."

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royal assent whereby the Midland and Great Northern Railway companies were enabled, under certain circumstances, to acquire an interest in the said railway so being constructed by the Manchester, Sheffield, and Lincolnshire Railway Company; by section 4 of such act it was provided, that within three months after the passing of that act the Sheffield Company should deliver to the other two companies an account of all payments made in respect of the undertaking, and of all liabilities incurred in respect thereof, verified by a declaration under the seal of the Sheffield Company; and by section 6 it was provided that within six months after the passing of the said act the two companies should pay to the Manchester, Sheffield, and Lincolnshire Company, a sum equal to two-thirds of the expenditure, with interest thereon; and by section 7 it was declared, that *from and after the date of the said payment, the said two companies should be deemed joint owners with the Sheffield Company of the undertaking in equal shares*, and should become jointly bound to perform the duties and liabilities by the act of 1865 imposed on the Sheffield Company solely; and by section 8 it was provided that if the two companies should become joint owners of the undertaking with the Sheffield Company, it should not be lawful for that company to raise more than one third of

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s. 6. "Within six months after the passing of this act, the two companies shall pay to the Sheffield Company in equal proportions, a sum equal in the aggregate to two-thirds of the expenditure so made upon the undertaking, with interest thereon after the rate of five pounds per centum per annum from the date or dates when such expenditure has been incurred by the Sheffield Company, up to the date when such payment shall be made by the two companies.

s. 7. "From and after the date of the said payment by the two companies, the two companies shall, subject to the provisions of this act, be deemed joint owners with the Sheffield Company of the undertaking in equal shares, and the undertaking shall belong to, and be vested in, the three companies jointly and equally, and they shall be jointly and equally bound to perform and discharge the duties and liabilities by the Liverpool Extension Act, 1865 (28 & 29 Vict. c. ccclxxviii.) imposed on the Sheffield Company solely with reference to the undertaking.

s. 8. "If the two companies shall become joint owners of the undertaking under this act, it shall not be lawful for the Sheffield Company to raise more than one-third of the capital authorized to be raised by them under the Liverpool Extension Act, 1865 (28 & 29 Vict. c. ccclxxviii.), nor to borrow more than one-third of the moneys by that act authorized to be borrowed."

the capital authorized to be raised by the act of 1865. Two months after the inquisition had been taken, Lord Sefton's agents ascertained by inquiry of the sheriff, that at the time of the passing of the act of 1866 he was possessed of some shares in the Midland Railway Company. Upon ascertaining this to be the case an application was made to this Court for a rule for the certiorari on the ground that the sheriff was "interested in the matter in dispute," within the meaning of the 39th section of the Lands Clauses Act, and that the proceedings were therefore voidable at Lord Sefton's instance.

It is a maxim of law well established that no man shall be judge in his own cause, and accordingly it has been held, in a variety of cases, that a direct pecuniary interest in the matter in dispute disqualifies any person from acting as judge in such matter: *Reg.* v. *Rand* (1); and in like manner, formerly, witnesses were disqualified from giving evidence in a cause in the event of which they had a direct and certain interest.

The interest, however, which disqualifies at common law must be direct and certain, and not remote or contingent. We think that the words "interested in the matter in dispute," in the 39th section, are intended to convey the same meaning; that under the circumstances of this case the sheriff at the time the warrant was issued, and the jury summoned, and the inquiry held, had no certain or direct interest in the subject matter in dispute which disqualified him from acting by his under-sheriff in summoning the jury and taking the inquisition. There is no doubt that had the sheriff been then disqualified by interest, the jealousy of the law would not have allowed the act of the under-sheriff to be supported, on the ground that in the particular case the sheriff had not interfered, and was in fact ignorant of the proceedings. Had the six months elapsed from the passing of the act of 1866, and the money been paid by the Midland Company, the result would have been different, inasmuch as the Midland Company having thereupon become a joint owner in the undertaking, the sheriff would have had a direct and certain interest in the matter in dispute. At the time the warrant was issued and the inquisition held, his interest in the matter in dispute was neither direct

(1) Law Rep. 1 Q. B. at p. 232.

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nor certain, but simply contingent and remote, depending upon the actual completion of the parliamentary arrangement made between the three companies. It was, however, said, that at all events the Manchester, Sheffield, and Lincolnshire Company would have had a right of action against the Midland and Great Northern Companies, had the non-completion of the arrangement arisen from their default, and that the damages to be recovered might be increased by reason of these proceedings. It is difficult to see that such a result would constitute a direct and certain interest in the sheriff. It rather appears to us to be an interest at once contingent and remote, and therefore not within the section. The provisions of the act of 1866 appear to be framed under the idea that the intended arrangement might after all not take effect. In the view which we take of the provisions of the act the sheriff was not disqualified, and the present is certainly not a case in which we should be astute to give effect to an objection, purely technical, and without a particle of merits to support it. The rule, therefore, will be discharged with costs.

Rule discharged, with costs.

Attorneys for prosecution: *Cunliffe & Beaumont.*
Attorneys for defendants: *Sharpe & Parker.*

Jan. 12.

WOOD *v.* BOOSEY AND ANOTHER.

Copyright—5 & 6 *Vict. c.* 45, *ss.* 13, 24, *and sch.*—*International Copyright Act* (7 *Vict. c.* 12), *s.* 6—*Entries in Register of Proprietorship and Assignment* —"*Author or Composer*"—*Arrangement for the Pianoforte of Score of an Opera*—*Rights of Assignee.*

7 Eq 271-2.
19 L.T. 625.
4 C.D. 420
5 Ch.D. 269
46 L.J.Ch.

By s. 6 of the International Copyright Act, 7 Vict. c. 12 (which incorporates the Copyright Amendment Act, 5 & 6 Vict. c. 45), no author of any musical composition first published in a foreign country shall be entitled to the benefit of the act unless, within the time mentioned in the Order of Council applying to that country, the musical composition shall have been registered, with the following particulars:—Title of the work, name and place of abode of the author or composer, time and place of the first publication in the foreign country.

N. composed and published an opera in full score at Berlin, and after his death B. arranged the score of the whole opera for the pianoforte, also the overture for the piano, and the whole opera pour le piano seul; in registering these arrangements in England, N.'s name was inserted as composer:—

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Held, that the arrangements for the pianoforte were independent musical compositions, of which B., not N., was the composer; and the entry made under s. 6, was invalid, and gave no title to the assignee of the registered compositions.

The time of first publication of one of these compositions was entered as 1850, without any day or month.

Semble, by Blackburn, J., that this was not sufficient.

By s. 13 of 5 & 6 Vict. c. 45, the registered proprietor of copyright may assign his interest by making entry in the register of such assignment and of the name and place of abode of the assignee in the form given in the schedule; the form omits all mention of the place of abode. By s. 24, no proprietor of copyright shall maintain an action for infringement unless he has made an entry in the register pursuant to the act.

An entry, purporting to be an assignment of a musical composition, omitted the place of abode of the assignee.

Quære, whether the entry was not defective? but *quære*, also, whether, if there were a valid entry of the original proprietorship and a valid assignment otherwise than by an entry on the register, the assignee could not maintain an action?

aff'd 3 Q.B. 223.

THE first count of the declaration alleged an infringement of a copyright, of which the plaintiff was the proprietor, in a book or musical composition called "Die Lustigen Weiber von Windsor, Komische oper, composed by Otto Nicolai. Pianoforte score."

The second count was for the infringement of the copyright in a musical composition called "Die Lustigen Weiber von Windsor. Overture."

The fourth (1) count was for an infringement of the copyright in a musical composition called "Die Lustigen Weiber von Windsor. Pour le piano seul."

The fifth count was for an infringement of a musical composition called "Die Lustigen Weiber von Windsor, oper in drei akten, musik von Otto Nicolai."

Pleas to each of the counts. First, not guilty; second, that the plaintiff was not the proprietor of the copyright; third, that the copyright was not a subsisting right; fourth, that the musical composition was printed and afterwards first published in a foreign country named in an Order in Council of her Majesty, and that such musical composition was not registered, nor was one printed copy of the whole of such musical composition delivered as by law required for the purpose of obtaining the privilege of copyright; fifth, that the plaintiff did not before commencement of the action cause an entry to be made in the book of registry of the

(1) The third count was struck out under a judge's order.

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Stationers' Company of such musical composition as by law required.

At the trial before Cockburn, C.J., at the sittings in Middlesex after Michaelmas Term, 1865, it was proved that Otto Nicolai composed an opera called "Die Lustigen Weiber von Windsor," which was first performed at Berlin on the 9th of March, 1849; Otto Nicolai died in May, 1849, and Ferdinand F. Brissler in the years 1850-51, arranged for Messrs. Bote & Bock, of Berlin, from the original opera the musical compositions mentioned in the first, second, and fourth counts.

The *Gazette*, containing an Order in Council founded upon a treaty on copyright between Prussia and England was put in, from which it appeared that from and after the 1st of September, 1846, the authors of books, dramatic works, musical compositions, and any other works of literature, in which the laws of Great Britain give to the British subjects the privilege of copyright, and the executors, administrators, and assigns of such authors respectively shall, as respects works first published within the dominions of Prussia after the 1st of September, 1846, have the privilege of copyright therein for a period equal to the term of copyright, which authors of the like works respectively first published in the United Kingdom are by law entitled to, provided such books, dramatic pieces, and musical compositions have been registered, and copies thereof have been delivered, according to the requirements of 7 Vict. c. 12, *within twelve months after the first publication* thereof in any part of the Prussian dominions.

A certified copy of an entry of the pianoforte score made at Stationers' Hall under 7 Vict. c. 12, s. 6, was put in, which was as follows :—

Time of Making the Entry.	Title of Book.	Name and Place of Abode of the Author or Composer.	Name and Place of Abode of the Proprietor of the Copyright.	Time and Place of First Publication.
October 4, 1851.	Die Lustigen Weiber von Windsor, Komische Oper, composed by Otto Nicolai. Pianoforte Score.	Otto Nicolai, Berlin.	Ed. Bote and G. Bock, Berlin.	Berlin, 1st Sept. 1851.

Similar entries were put in as to the overture arrangement, and the composition pour le piano seul; but in that as to the overture in the fifth column was Berlin, 1850, only, without any day of the month.

A certified copy of an entry of the assignment of the pianoforte score to the plaintiff under 5 & 6 Vict. c. 45, s. 13, was put in, which was as follows:—

Date of Entry.	Title of Book.	Assignor of the Copyright.	Assignee of Copyright.
Aug. 15, 1864.	Die Lustigen Weiber von Windsor Konische Oper, composed by Otto Nicolai. Pianoforte Score.	Emilie Bock, Emil Bock, Ferdinand Schneider, and Edward Pehlemann, all of Berlin, in Prussia, the legal personal representatives of the firm of Gustave Bock and Edward Bote, of Berlin.	George Wood.

Certified copies of similar entries of assignment of the overture and the arrangement pour le piano seul were put in evidence.

No evidence was given of any entry made at Stationers' Hall under 7 Vict. c. 12, s. 6, of the book mentioned in the last count of the declaration.

The plaintiff also put in evidence a deed dated 11th of August, 1864, made between Emilie, widow of Gustave Moritz Bock, of the first part, Emil Bock, Ferdinand Schneider and Privy Councillor Pehlemann of the second part; William Chappell of the third part; Thomas Willert Beale of the fourth part; and the plaintiff of the fifth part; by which the parties of the first, second, third, and fourth parts assigned to the plaintiff all the opera or musical composition of Otto Nicolai, intituled "Die Lustigen Weiber von Windsor," and all that the libretto or words of the said opera, which were written and composed by Mosenthal, and all the full and absolute copyrights of and in the same opera and libretto, respectively, and all the profits and advantages thereof, and of every part thereof, and all renewals and revisions of copyright, together with all the right of printing and publishing the same opera and libretto, and also of representing or performing the opera, and all the estate, right, title, interest, claim, and demand of them, the

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parties of the first, second, third, and fourth parts into and upon the premises.

Copies of three books, being the books mentioned in the first, second, and fourth counts, deposited in the British Museum, were put in evidence, from which it appeared that the full title to each of these musical compositions, as first published at Berlin, was "Die Lustigen Weiber von Windsor Komish phantastische Oper in drei akten, mit tanz, nach Shakespeare gleichnamigen Lustspiel, bearbitet von H. S. Mosenthal, musik von Otto Nicolai."

It was admitted on behalf of the defendants that they had printed and published the musical compositions mentioned in the first, second, and fourth counts of the declaration; but it was objected that the plaintiff had failed to establish any copyright in either of them, and ought to be nonsuited; and it was contended that the entries, which purported to be made in compliance with s. 6 of 7 Vict. c. 12, were insufficient, for not setting forth the correct title of the several musical compositions mentioned in the first, second, and fourth counts, and for stating that Otto Nicolai was the composer of them, whereas Brissler and not Nicolai was the composer; that the entry of the overture was also insufficient for stating the year only, and not the day on which it was first published. That the entries at Stationers' Hall of assignment of the musical compositions mentioned in the first, second, and fourth counts did not comply with the requirements of s. 13 of 5 & 6 Vict. c. 45, by stating the place of abode of the plaintiff as assignee; and that the plaintiff had not made an entry of his proprietorship under s. 24 of the 5 & 6 Vict. c. 45. The Chief Justice thereupon nonsuited the plaintiff, with leave to move to enter a verdict.

A rule was accordingly obtained to set aside the nonsuit, and enter a verdict for the plaintiff, on the ground that the copyright in the opera had been properly registered under the copyright acts, and that it had been duly assigned to the plaintiff, and that such assignment had been duly registered under the acts, so that the plaintiff was entitled to recover under such assignment.

Jan. 11. *Coleridge, Q.C., J. Brown, Q.C.,* and *Blaine,* shewed cause. The plaintiff can only claim by virtue of the International Copyright Act, 7 Vict. c. 12, which (ss. 3 and 8) incor-

porates the Copyright Amendment Act, 5 & 6 Vict. c. 45. (1) The objections taken to the original registration of the proprietorship, and of the assignment to the plaintiff, are fatal to the plain-

(1) The Copyright Amendment Act, 5 & 6 Vict. c. 45, ss. 2 & 20, "book" is to include musical compositions.

s. 13. "That after the passing of this act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers' Company of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the book, or of any portion of such copyright, in the form in that behalf given in the schedule to this act annexed, upon payment of the sum of five shillings to the officer of the company; and that it shall be lawful for every such registered proprietor to assign his interest or any portion of his interest therein by making entry in the book of registry of such assignment, and of the name and *place of abode of the assignee* thereof, in the form given in that behalf in the schedule, on payment of the like sum; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed."

The form No. 5 in the schedule has the heading "Assignee of Copyright," without any mention of the place of abode.

s. 24. "That no proprietor of copyright in any book which shall be first published after the passing of this act, shall maintain any action or suit at law or in equity, or any summary proceeding in respect of any infringement of such copyright, unless he shall before commencing such action, suit or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company of such book pursuant to this act: Provided always that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid: Provided also, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of 3 Wm. 4, c. 15, to amend the laws relating to dramatic literary property, or of this act, although no entry shall be made in the book of registry aforesaid."

The International Copyright Amendment Act (7 Vict. c. 12, s. 1) repeals the former International Copyright Act (1 & 2 Vict. c. 59). Section 2 enables the Queen in Council to direct that, as to books (which by s. 20 includes music) which shall be first published in any foreign country to be named in the order, the authors and their assigns shall have the privilege of copyright during the period defined in the order, not exceeding the time authors of works first published in the United Kingdom have. By s. 3, if the order apply to books, all the enactments of 5 & 6 Vict. c. 45, shall apply, as if the book were first published in the United Kingdom.

s. 6. "That no author of any book, dramatic piece, or musical composition, or his executors, administrators, or assigns, and no inventor, designer, or engraver of any print, or maker of any article of sculpture or other work of art, his executors, administrators, or

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tiff's title. Section 6 of 7 Vict. c. 12 requires registration of a work published abroad to be made within the time prescribed by the Order in Council; under which, by s. 2, the foreign authors and their assigns are just in the same position as English subjects; that time in the present case is within twelve months of the first publication in Prussia. And amongst other particulars the name and place of abode of the author or composer is to be given. The copyright the plaintiff claims is for pianoforte arrangements of a particular opera; and as the author or composer of these compositions, the name of Otto Nicolai is given; whereas he was the composer of the original opera, and the arrangements in question were made by Brissler after Nicolai's death. The first question, therefore, is, who was the composer of these particular pieces of music for the pianoforte? Clearly Brissler. It is true that the original airs, &c., are the invention of Nicolai; but the composition of the pianoforte score is an entirely new work, requiring equal musical skill, if not invention, as the original opera. In Renouard, traité des droits d'auteurs, tom. 2, p. 190, s. 78, such arrangements or adaptations are declared to be within the privilege of copyright. "Des arrangemens, variations, valses, con-

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assigns, shall be entitled to the benefit of this act, or of any order in council to be issued in pursuance thereof, unless within a time or times to be in that behalf prescribed in each such order in council, such book, dramatic piece, musical composition, print, article of sculpture, or other work of art, shall have been so registered, and such copy thereof shall have been so delivered as hereinafter is mentioned (that is to say) as regards such book, and also such dramatic piece or musical composition (in the event of the same having been printed) the title to the copy thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor of the copyright thereof, the time and place of the first publication, representation, or performance thereof, as the case may be, in the foreign country named in the order of council under which the benefits of this act shall be claimed, shall be entered in the register book of the Company of Stationers in London," &c.

By s. 8. The several enactments of the 5 & 6 Vict. c. 45, as to keeping the register book, &c., shall apply to the books, dramatic pieces, and musical compositions, &c., to which the order in council shall extend, "and to the entries and assignment of copyright and proprietorship therein, in such and the same manner as if such enactments were herein expressly enacted in relation thereto, save and except that the forms of entry prescribed by that act may be varied to meet the circumstances of the case," &c.

tredanses, etc., composés sur un thème, un air, un motif même, appartenant au domaine public; des pots-pourris, sorte de compilation musicale, disposés dans un certain ordre et avec certaines liaisons ou transitions, sont-ils des objets de privilège? Je n'hésite pas à croire que la solution affirmative résulte des principes généraux sur la matière, exposés au commencement de ce chapitre, nos. 47, à 55. Il résulte des mêmes principes que ces compositions ne conféreront un privilège qu' autant qu'elles supposeront de l'art, du travail, un effort d'intelligence; qu'elles seront, en un mot, une production de l'esprit." There is also the objection to the entries that they do not give the full title of the copy. There is also the further objection to the entry of the overture that it does not state the day or month of the first publication, but only the year. This is not an objection of mere form, as the copyright must date from the day of first publication: *Sayer* v. *Dicey*. (1) In *Low* v. *Routledge* (2) Kindersley, V.C., held the omission of the day of first publication in the original entry fatal to the title of the assignee. The entries of the assignment are equally defective, as they omit to state the place of abode of the assignee. This is required by s. 13 of 5 & 6 Vict. c. 45, and this express requirement cannot be got rid of by the fact that the form of entry of assignment, No. 5, given in the schedule, has only "assignee of copyright." Moreover, s. 24 forbids the proprietor of the copyright to sue until he has made an entry of the book, &c., in the register, pursuant to the requirements of the act; and "proprietor" must include assignee just as much as the original proprietor. Proprietor must mean proprietor for the time being. In other sections, such as ss. 15, 16, 17, and 23, the word proprietor must mean proprietor for the time being; otherwise the penalties of infringing the copyright would not be incurred after the copyright had been assigned. Even, therefore, if the assignment by deed to the plaintiff be relied on, he cannot sue till he is properly registered.

Jan. 12. *Parry*, *Serjt.*, *Patchett*, and *Pike*, in support of the rule. If the owner of a foreign copyright has complied with the requirements of 7 Vict. c. 12, s. 6, he has acquired a copyright in this country which he can assign, either by deed or under s. 13 of 5 & 6 Vict. c. 45. In the present case an entry under s. 6 of 7 Vict.

(1) 3 Wils. 60.

(2) 33 L. J. (Ch.) 717, 723-4.

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c. 12, has been made, but it is contended that that entry is insufficient, because the title of the book, as set forth in the entry and of the book produced from the British Museum, does not correspond. No doubt there is a slight difference, but substantially the title is the same. The title of the work is "Die Lustigen Weiber von Windsor;" that it is a comic opera, in three acts, from the text of Shakspeare; that the words are by Mosenthal, and the music by Nicolai, is no part of the title of the work. The title of the work, as set forth in the entries, is, therefore, substantially correct. With regard to the objection to the entry as to the authorship, Otto Nicolai is the composer of the opera, though Brissler was employed to arrange the music for the pianoforte. He was the editor, who arranged the music and altered the mode of performing it, but he did not alter the melody. What Brissler did would have no value but for the original melodies. A person does not by varying the melodies of a piece of music become the composer of it. The pianoforte score consists of a line of notes for the voice, a line of notes for the treble, and a line of notes for the bass, and what those notes express is the composition of Nicolai. Brissler has done nothing new; his work is simply a transposition of what Nicolai has done; the arrangement is merely mechanical. It is not a new invention, or a new work, which would be the subject of copyright.

[COCKBURN, C.J. The pianoforte score is the compression of all the accompaniments of the orchestra. To make the arrangement there must be an effort of the mind. It requires both musical skill and science.]

Brissler was the servant of the proprietors of the copyright, employed by them to make the arrangement, and the ideas expressed by the music and the melody of the opera were the creation of Nicolai; and by adapting them to a single instrument Brissler did not become either the author or composer, and he could acquire no copyright in his work: *Hatton* v. *Kean* (1); the judgment of Erle, J., in *Jefferys* v. *Boosey*. (2)

On the second point it is unnecessary to the plaintiff's title to have made an assignment by way of entry. The assignment by

(1) 7 C. B. (N.S.) 268; 29 L. J. (C.P.) 20.
(2) 4 H. L. C. at p. 867.

deed is a sufficient assignment of all the musical compositions the plaintiff claimed; and, further, it was unnecessary to state the place of abode of the assignee in the entry registered at Stationers' Hall. Section 13 of 5 & 6 Vict. c. 45, requires the entry to be made "in the form given in that behalf in the schedule," and the entry has been made according to form No. 5 in the schedule. The plaintiff was not a "proprietor" within the meaning of s. 24, so as to render an entry of his proprietorship under that section necessary to enable him to sue: that section applies only to the case of an original proprietor of a work, and not to the assignee of a proprietor.

COCKBURN, C.J. This is an action brought for the infringement of copyright, which is created by the International Copyright Act, 7 Vict. c. 12, and the right, therefore, to maintain the action must depend on a compliance with the conditions imposed by that statute. One of these conditions is, that the work in respect of which copyright is claimed, whether it be literary or musical, shall be registered at the Stationers' Hall. The statute also requires that certain entries shall be made on the register, and, inter alia, that the name of the author or composer of the work shall be stated; and unless this formality is complied with, the right which the statute creates does not come into existence.

Now, in this case the work registered was the pianoforte score, or the arrangement for the piano, of the music of an opera called Die Lustigen Weiber von Windsor, which score was stated to be composed by Otto Nicolai; in point of fact, the arrangement for the piano was not composed by him, but by Brissler, and not published until some months after the death of Nicolai, who, no doubt, was the composer of the original opera. The first question, therefore, which presents itself is, whether the terms of the statute, which requires that the name of the author or composer of the book or composition shall be entered on the register, has been complied with. That of course depends on the question—which is one of fact—whether the arrangement of the opera for the pianoforte can be considered as the "composition" of Otto Nicolai, who was the composer of the original opera, or whether it is not the "composition" of Brissler, by whom it was made.

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It has been argued very ingeniously, on the part of the plaintiff, that, inasmuch as the opera itself was the creation of the musical genius and mind of Otto Nicolai, in whatever form that opera is reproduced it must still be considered as the work of the original composer. That is an ingenious way of putting the argument, but I cannot think it is a sound one. It seems impossible to believe that any musician, however great his talent, whether as a composer or an executant, from the mere circumstance of having the opera in its entirety before him, that is to say, with all the score for all the instruments, which neither eye nor mind could take in at the same time, could be able to play the accompaniment while singing the music of the opera at the piano. It requires time, reflection, skill, and mind so to condense the opera score as to compose the pianoforte accompaniment. I think I may venture to say that even if Otto Nicolai, who composed the original opera, had undertaken to arrange it for the piano, he would have found it required all his musical skill and attainments to accomplish the work. I cannot, therefore, bring myself to think that the pianoforte arrangement of the music of an opera, which originally consisted of vocal music and instrumentation to be executed by some half hundred instruments, can be said to be anything else than a specific, separate, and distinct work from the opera itself. And it seems to me that to hold otherwise would lead to very serious consequences. Operas are very frequently arranged, sometimes by the composer of the opera himself, sometimes by other persons, with the consent or without the consent of the original composer. It may be, if the arrangement be made without the consent of the composer of the opera, such an adaptation would be an infringement of his copyright, which would subject the adapter to an action. It is not necessary to decide that. But it may be that, after the copyright has expired, an arrangement for the pianoforte may be made in the first instance, or some musical composer, thinking that an arrangement that already existed of some well known and popular opera is not as good as it can be made, might apply his hand to the work, and make a new arrangement. Can it be said that such an arrangement, useful as regards the musical world, shall not be the subject of protection under the Copyright Acts? Yet, if my brother Parry's argument is good, being founded on the fact

that there is an identity between the original composition and any form in which the score of that opera can be produced, it would follow that the copyright could exist only in the original opera; and if the original composer adapted his music to the piano or any other instrument, he would have no copyright in such an arrangement as distinct from the opera itself, nor would any one who made the arrangement with his consent, or after the copyright in the opera had expired, have any copyright. That would be a monstrous conclusion at which to arrive, and a most unjust one: as, I am satisfied, very considerable skill, labour, and musical knowledge is required to adapt the music of an entire opera to the pianoforte, or to any single instrument. I think we must hold that the true author of this composition, viz. the arrangement of the music of this opera for the pianoforte, was Brissler, and consequently the name of Otto Nicolai has been improperly entered upon the register as the composer. Whether it was honestly done or not, it is not for me to say. Otto Nicolai was dead, and Brissler was employed by Messrs. Bote and Bock, of Berlin, to compose the pianoforte arrangement, which would be more acceptable to the musical world, no doubt, under the name of Otto Nicolai than if it came from an inferior hand. It may be that that was the reason that Otto Nicolai's name was given as the composer of the arrangement, instead of Brissler's. With that we have nothing to do. I consider it is important that the person who composes the adaptation or arrangement of this kind shall be considered as the author, because otherwise such a composition would be wholly without protection. I think such compositions are useful, and ought to have the protection of the Copyright Acts. I think, therefore, that this objection is fatal to this action.

With regard to another point raised, namely, that the place of abode of the plaintiff as assignee ought to have been on the register. If it were necessary to decide that point, I should desire further time to consider it. I must say that the result of the discussion has been to cause me very strongly to incline to the opinion that s. 24 of 5 & 6 Vict. c. 45, which requires that the proprietor shall be registered before he shall be entitled to bring an action for the infringement of his copyright, does not apply to the case of an assignee to whom the proprietorship is assigned. The

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moment the copyright is established in the original proprietor, there is nothing to prevent him from assigning by any mode by which property of that description can be assigned in law, the statute only affording one mode of making the assignment more convenient and less expensive than the ordinary mode of conveyance by deed. If the assignment is made under the statute, then, no doubt, its terms must be complied with, and by s. 13 it is necessary, where an assignment is made, that the name and place of abode of the assignee shall be stated. Unhappily, there is a discrepancy between the enactment in the section and the schedule to which the section expressly refers; for, whereas the section requires that the name and place of abode of the assignee shall be entered in the form given by the schedule, in the form No. 5, given in the schedule, there is no reference whatever to the place of abode of the assignee. But, taking this not to be a statutory assignment, is it necessary that the assignee should cause an entry of proprietorship to be made under s. 24, before he can sue? Now, I observe that there is a distinction in the earlier sections between "proprietor," as applied to the person by whom the work is originally published, and in whom the property originally vested, and any person who takes by assignment from him; nor do I anywhere in the act find that the assignee has any right to insist upon having his name entered as the new proprietor: the only case in which the change of the name of the proprietor is to be made being where the statutory form of assignment is resorted to; and even in that case, it is not the assignee but only the assignor who can insist on the change being made in the register. Therefore, to hold, that the assignee must make an entry under s. 24 of his proprietorship, before he can sue for the infringement of the copyright transferred to him, he having no power under the statute, either through the means of this Court, or any other means that I can see, to enforce the registration of an entry by way of assignment under s. 13, and to apply the term proprietor to him would, I think, work considerable inconvenience, if not considerable injustice. However, although I make these observations, in passing, to shew the matter has not been overlooked, I do not desire to be understood as resting my present judgment on that point. As in this case there was a non-

suit, the plaintiff can bring another action; but as the evidence now stands, not Otto Nicolai, but Brissler, was the composer of the pianoforte arrangement; and, considering that as a substantive and independent work, and one that might have been the subject of copyright itself, I think the name of the true author or composer of the pianoforte score has not been entered on the register at Stationers' Hall; consequently, the plaintiff, who is the assignee, is not entitled to insist upon his copyright and to maintain an action.

The same observations apply to the overture and the arrangement for the pianoforte seul. The description in all three is the same, therefore the objection is in all three equally good, and I think the rule to set aside the nonsuit must be discharged.

BLACKBURN, J. I am of the same opinion. The plaintiff has been nonsuited, and if the nonsuit can be supported on any one ground the rule must be discharged. I agree with my lord that it can be supported on the objection taken under s. 6 of 7 Vict. c. 12.

This is an action by the assignee of a foreign proprietor of a musical composition published abroad, and he sues for an infringement of his copyright. His right to sue is founded on 7 Vict. c. 12 and Her Majesty's Order in Council under that statute as to works first published in Prussia. The act confers upon foreign authors and their assignees a copyright in their works, provided that they comply with the conditions of s. 6 and the Order in Council. Section 6 requires, among other things, that the title of the copy of the book, and the place of abode of the author or composer thereof, and the name and place of abode of the proprietor of the copyright thereof, and the time and place of the first publication or performance thereof, in the foreign country, named in the Order in Council, shall be entered at the Stationers' Hall. Unless that entry be made, neither the foreign author nor his assignee can enforce the copyright in this country. The question is, has this been done in the present case? I do not pretend to understand music, and I know nothing beyond what I have gathered in the course of the argument. The facts are, that Otto Nicolai composed the opera, the music of which was for the first

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time performed and published at Berlin; but the musical composition, as to which the plaintiff complains that his copyright has been infringed, is not the music as Nicolai originally composed it, but it is the pianoforte score of the same opera. Perhaps, strictly speaking, this would be matter for a jury, to be explained by the evidence of experts and others skilled in music; but I think the question has been sufficiently discussed to enable us to form an opinion. The fact, as I understand it, is that where an opera is composed so that the music, the theme as one might call it, and probably the genius of the work, is in the form of an opera, it cannot be used for a single instrument like the pianoforte unless some further process is gone through, by which the music which the original composer composed as a score for the whole orchestra is reduced to a score for the pianoforte. In this case, Nicolai having composed the opera, it was subsequently converted into a score for the pianoforte by Brissler, after Nicolai's death. Who, then, is the "composer" of the pianoforte score within s. 6, Nicolai or Brissler? I think, if the adaptation of Nicolai's music to the pianoforte has a degree of original invention and genius of its own, Brissler would be the author of the arrangement for the pianoforte, and of that arrangement only; because, as at present advised, though the question does not arise in the present case, I should think that Brissler could not publish that arrangement without the consent of Nicolai or his assignees, for I apprehend the music of the pianoforte score includes the music of the opera, of which Nicolai was the composer. So that, to make a perfect entry, there ought to have been an entry of both names. That might easily have been done. The entry might have been "Pianoforte score of 'The Merry Wives of Windsor,' composed by Nicolai, arranged for the pianoforte by Brissler." If that had been done, the conditions of the statute would have been complied with, as it would have stated who was the author or composer of the opera, and who was the author or the composer of the arrangement. I mention this to guard against its being supposed, while we think the composer of the opera is not necessarily the composer of the pianoforte score, that the composer of the pianoforte score can acquire an independent copyright. As soon as it appears that the arrangement of the opera for the pianoforte is an essential and

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necessary part of the utility of the book or piece of music in which the copyright is claimed, and that this involves a subordinate act, to be done by another, who is not the composer of the opera, then I think Brissler, who did that, was the author and composer, and consequently his name ought to have been stated in order to fulfil the provisions of the 6th section. This is a sufficient ground on which to support the nonsuit.

With regard to the objection that there is no entry of the plaintiff as proprietor of the copyright under s. 24 of 5 & 6 Vict. c. 45, at first I thought the objection fatal to the plaintiff's case, but after hearing the argument my opinion is much shaken, and I would not support the nonsuit on that ground without further time for consideration. I, however, express no opinion upon it.

With regard to the point as to the date of the publication of the overture, I think that is very clear. In order to comply with s. 6 of 7 Vict. c. 12, the day of publication, from which the period of the copyright was to run, ought to have been stated. To state the year of publication only is not a sufficient compliance with the statute; but that is a very minor point, and applies only to one of the counts.

MELLOR, J. I am of the same opinion. It was contended by my brother Parry that the pianoforte score of the opera was a mere accessory; that it was not an independent work which required independent thought, skill, and composition. I think that in the course of the discussion it had become apparent that it is not within the definition of accessory; it is something quite independent of the original opera itself. It is a work which makes the music of the opera a new mode of enjoyment by persons who can perform it on the piano. On looking at the first column of the entry I find, after the title of the opera, "Composed by Otto Nicolai: pianoforte score." In the next column, which requires the name and place of abode of the author or composer to be stated, I find "Otto Nicolai, Berlin." At the time the pianoforte score was arranged, Otto Nicolai was dead, and he was not the author or composer of the pianoforte score, which is an independent work, requiring the exercise of those faculties to which I have already referred. The objection cannot be answered, because s. 6 of 7 Vict.

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c. 12 requires the name and place of abode of the author to be stated, and it is not stated. I agree, therefore, with my Lord and my Brother Blackburn, that on this ground the rule must be discharged.

As to the other ground, at first I thought that "proprietor," in s. 24 of 5 & 6 Vict. c. 45, included assignee, because where a person assigns his entire interest in a work to another he is no longer a proprietor, but the assignee is the proprietor. But there may be a distinction between the proprietor originally registered and the assignee. It is unnecessary to decide the point, and I therefore express no opinion upon it; more particularly as, on the objection being stated, an assignment by deed was put in, which however still leaves the difficulty whether the assignee must not be registered as proprietor before he can sue by reason of the requirements of s. 24. I prefer, therefore, with the rest of the Court, to rest my judgment entirely on the ground of the defect in the original entry.

LUSH, J. I am also of opinion that the pianoforte score is an original composition, and the subject of copyright. It is produced by signs and scales, by which various scores of the opera have been condensed, so as to form one harmonious whole, and producing a piece of music capable of being performed by one person on a piano, and capable of representing, as far as it can be on one instrument, the entire opera. I think it is an entirely new composition, notwithstanding it is compiled from the original opera. That being so, it is clear from the evidence that the author of that composition is not Nicolai, because the arrangement was not even made in his lifetime. Brissler, the person who made it, has unfortunately not been registered as the author or composer. On that ground I think the provisions of the 6th section of 7 Vict. c. 12 have not been complied with, and the plaintiff's title is not complete.

With regard to the other point, I concur with the other members of the Court, in expressing, after the argument we have heard, considerable doubt, whether it is necessary for an assignee under the circumstances in the present case to make an entry of his proprietorship under s. 24 of 5 & 6 Vict. c. 45. As we have not

to decide that point, it is unnecessary to say anything more than that I entertain considerable doubt on the subject.

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Rule discharged.

Attorneys for plaintiff: *Pike & Son.*
Attorney for defendants: *R. Comyn.*

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Feb. 4.

Master and Servant—Truck Act, 1 & 2 *Wm.* 4, *c.* 37, *s.* 23—*Wages, Contract for Deductions from.*

Section 23 of the Truck Act, 1 & 2 Wm. 4, c. 37, permits an employer of an artificer to contract to supply the artificer with medicine, medical attendance, and materials to be employed in his occupation, if a miner, and to demise to the artificer a tenement at any rent reserved; and to contract to make stoppages or deductions from the wages in respect of rent, medical attendance, &c., provided the contract for such stoppages be in writing, and signed by the artificer:—

Held, that the amount to be deducted in respect of each head of deduction need not be specified in the written contract.

Under a contract in writing, allowing stoppage to be made for medicine and medical attendance, the employer may deduct 6*d.* a week, which by the practice of the mine was paid by each miner towards a club kept by the employer for the purpose of providing medicine and medical attendance for such miners as required them.

The contract as to the supply of materials in order to be within s. 23, must be shewn to be an absolute contract of sale, and not a mere contract of hiring by the artificer.

THE declaration contained a count for wrongfully dismissing the plaintiff from the defendant's service, and also indebitatus counts for work and services done as the hired servant of the defendant, and for wages due in respect thereof; for goods bargained and sold, and goods sold and delivered, and materials provided by the plaintiff for the defendant, and money due on accounts stated.

The defendant pleaded several pleas to the first count, which it is unnecessary to refer to, and to the indebitatus counts he pleaded, except as to 17*l.* 11s., never indebted, payment, and set-off for money due for the use and occupation of a cottage, for goods sold and delivered, and bargained and sold, and for money paid to the

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plaintiff's use, and money due on accounts stated; and, as to the 17*l.* 11*s.*, payment into court.

The plaintiff took issue on the defendant's pleas, and as to the plea of set-off, replied that the claims of the defendant's set-off were for rent of a cottage, for goods and medical attendance supplied by the defendant to the plaintiff, all of which items accrued after the passing of the 1 & 2 Wm. 4, c. 37, and that the plaintiff was a miner, and employed by the defendant in a coal mine, and that the action was brought by him as such miner against the defendant as his employer, amongst other things, for the recovery of money due to the plaintiff as such miner as the wages of his labour, to which claim for wages the defendant had pleaded the set-off; and that there was no contract in writing for and in respect of the items of set-off according to the provisions of the statute.

At the trial before Mellor, J., at the summer assizes, 1866, for Derbyshire, the following facts were proved:—The plaintiff entered into the service of the Wingerworth Colliery Company (in which the defendant was a partner) as a miner and stallman, on the 16th of September, 1865, and was dismissed on the 13th of December. (1) On the day he was hired he signed the following agreement in a book, which contained the general, special, and contract rules of the colliery:—

"We, the undersigned, do hereby agree to work for the Wingerworth Coal Company, according to the terms of the foregoing general, special, and contract rules. As witness our hands."

Rules 20 and 26 are material.

Rule 20. Every stallman and labourer shall provide himself with all necessary punches, lids, *sprags*, oil, gunpowder, working tools, and other implements, except such punches, lids, and sprags as shall be supplied by the owners as stock for any stall or other work, and except rails and wagons, and the rails and wagons shall be provided by the owners, and shall be restored, together with the punches, lids, and sprags supplied by the owners as stock, to the owners in good condition when demanded.

Rule 26. All rents of houses, gardens, &c., due to the owners of these works, and all charges to which any workman shall be liable

(1) The facts as to the alleged wrongful dismissal are omitted.

for wood, tools, or working materials obtained from the stores belonging to the works, and for repairs to any tools or working materials done on the works, and for medicine and medical attendance, and all other lawful stoppages, shall be deducted from the earnings of such workmen before such earnings be paid. The rent, charges for tools, materials, repairs, medicine and medical attendance, and other stoppages due both from the stallmen and the labourers employed under them, shall be deducted by the owner from the money which may be payable by him to the stallman.

On the same day that the plaintiff signed the book containing the above rules, he also signed the following agreement:—Memorandum of agreement made and entered into on the 16th of September, 1865, between John Chambers, Henry Cox, and John Ward (trading under the firm of the Wingerworth Coal Company) of the one part, and James Cutts of the other part. J. Chambers, H. Cox, and J. Ward hereby let, and J. Cutts takes, the dwelling-house, outbuildings, garden, and other appurtenances, situate at 22, King's Row, from the date hereof, from fortnight to fortnight, at the rent of 4*s.* per fortnight, J. Cutts paying all rates and taxes, &c.

The plaintiff having established a claim for wages beyond the amount paid into court, the defendant sought to set off against the claim the following items: for rent, 19*s.*; for wood, 8*s.* 6*d.*; and for medicine and medical attendance, 6*s.*

The rent was due in respect of the cottage let to the plaintiff, and occupied by him under the agreement of the 16th of September.

As to the item of 8*s.* 6*d.* for wood, the evidence was very confused and contradictory. The defendant's evidence went to shew that according to rule 20 the miners were bound to provide themselves with sprags necessary to prop the roof during their working, in consideration of which they received 2*d.* extra per load for coal got, and the company supplied the necessary sprags from their stores at half the cost price, deducting that amount under rule 26. For the plaintiff it was shewn that on his dismissal he was not allowed to take away the wood, and it was contended on behalf of the plaintiff that the wood was not sold, but was supplied for use in the mine, and the sum charged against the

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miner using it, as a security against breakage or improper use, to be returned if the wood remained in good condition.

The item of 6*s.* was twelve weeks' subscription at 6*d.* per week, which, by agreement between the company and the miners, was to be paid by each miner towards a club which the defendant kept, and of which he managed the funds, for the purpose of supplying medical attendance and medicine to the miners when sick. The plaintiff, during his service, neither required nor received either, and, being a member of the Foresters' benefit club, he contended he could never have required them.

It was objected by the plaintiff that these items could not be set off, as there was no contract in writing under s. 23 of the Truck Act, 1 & 2 Wm. 4, c. 37, specifying the particulars of each deduction; and it was further objected that the supplying of the wood to the plaintiff was not a supplying of any materials to be employed by the plaintiff in his trade or business within the meaning of the above section.

The learned judge left the case generally to the jury.

The jury found a verdict for the defendant; and leave was reserved to move to enter the verdict for the plaintiff, on the indebitatus counts, for any balance found due to the plaintiff, if the Court should be of opinion that any or all of the deductions were illegal.

A rule was obtained accordingly to enter the verdict for the plaintiff, on the ground that the defendant could not legally deduct or set off any sum for rent, wood, or club money.

Hayes, Serjt., and *Beasley*, shewed cause. The defendant claims to deduct from the plaintiff's wages three items—19*s.* for rent, 6*s.* for medical attendance, and 8*s.* 6*d.* for wood; and it is quite clear that such deductions can be made under s. 23 (1) of 1 & 2

(1) 1 & 2 Wm. 4, c. 37, s. 23: "And be it further enacted and declared that nothing herein contained shall extend or be construed to extend, to prevent any employer of any artificer or agent of any such employer from supplying or contracting to supply to such artificer any medicine or medical attendance, or any fuel, or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such artificer be employed in mining; or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation; nor from demising to any artificer, workman, or labourer employed in any

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Wm. 4, c. 37. The objection against the first two items is, that rule 26, which allows such deductions to be made, does not specify the exact amounts which are to be deducted. The proviso at the end of s. 23, requiring that the agreement, stipulating that the deductions shall be made, shall be in writing, is silent as to the amount of the deductions; and in many cases it would be impossible to insert the amounts. There has been a substantial compliance with the statute, and the defendant is entitled to set off those items. The defendant is also entitled to deduct the item of 8*s.* 6*d.* for wood, as materials supplied to the plaintiff—who is a miner—to be employed in his trade.

J. W. Mellor, in support of the rule. To allow the defendant to make these deductions from the plaintiff's wages would be to permit him to evade the Truck Act. The agreement that the deductions shall be made ought to contain the amounts to be deducted, and the deduction must be for medicine actually supplied. A contract that 6*d.* a week shall be deducted for medical attendance which may never be required is not within s. 23. The contract must not only be in writing, but it must contain all the terms of the contract, and all the items to be deducted. This contract is imperfect in these respects. The contract is also one-sided. Under the rule the master does not contract to supply any medicine; the contract must be one which the workman can enforce against the master. With regard to the rent, the amount of rent to be deducted is not mentioned in the contract signed by the

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of the trades or occupations enumerated in this act, the whole or any part of any tenement at any rent to be thereon reserved; nor from supplying or contracting to supply to any such artificer any victuals, dressed or prepared under the roof of any such employer, and there consumed by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent, or for or in respect of any such medicine or medical attendance; or for or in respect of such fuel, materials, tools, implements, hay, corn, or provender, or of any such victuals dressed and prepared under the roof of any such employer; or for or in respect of any money advanced to such artificer for any such purpose as aforesaid: Provided always, that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn, and provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer."

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plaintiff. With regard to the deduction for the wood, *Archer* v. *James* (1) shews that the section only applies to cases where the property in the things supplied to the workmen has passed. Here the property in the wood never passed to the plaintiff. It belongs to the defendant, and the plaintiff could not take it away. It appears from the evidence that the men were wasteful of the timber, and therefore they were charged 8*s.* 6*d.* as a security against its improper use. No deduction can therefore be made with respect to the wood.

BLACKBURN, J. At the trial the plaintiff claimed wages from the defendant, who sought to deduct from that claim three items: For rent, 19*s.*; for wood and materials, 8*s.* 6*d.*; and a sum of 6*s.*, being at the rate of 6*d.* per week, to be paid by the plaintiff to the defendant as his subscription towards a club, which the evidence shewed was kept by the defendant for the purpose of supplying the workmen, in the event of their being sick, with medical attendance. At common law the defendant would have had a perfect right to make those deductions, but the legislature for the protection of workmen employed in certain trades, by a very stringent enactment, the 1 & 2 Wm. 4, c. 37, ss. 1–5, have prohibited the payment of wages in goods, or otherwise than in the current coin of the realm, except in certain cases provided for by s. 23. [The learned judge read the section.] It is plain enough that the employer might deduct money advanced to an artificer for the purpose of supplying himself with any of the enumerated things; and it is to be observed that the words "medicine" or "medical attendance," and the word "rent," are not inserted in the proviso at the end of the section, the legislature thinking it right to protect the artificer from an exorbitant charge in respect of fuel, materials, and the other things mentioned, but thinking there was little danger of the employer entering into a partnership with a medical man to make a profit out of a sick workman, and they appear also to have thought that the amount of rent might be left to be settled between them. In the present case, however, there is a contract in writing, signed by the plaintiff, in which there is an express stipulation that all rents of houses, and all charges to which any

(1) 2 B. & S. 61; 31 L. J. (Q.B.) 153.

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workman shall be liable for wood, tools, or materials, and medical attendance, shall be deducted from the earnings of a workman before they are paid over to him. There is, therefore, a clear contract in writing, signed by the artificer, that a deduction shall be made in respect of these things, but the contract does not shew what particular article or thing was to be supplied, or what amount paid, or in respect of what house the rent was to be paid, or what medical attendance was to be furnished; and if the plaintiff's counsel is correct in contending that the statute requires that the amount to be deducted in respect of every article or thing supplied should be specified in the written contract, then this contract is not a sufficient contract within the meaning of s. 23. I think the true construction of that section is, that before any rent be due, or any sum be due for medicine, or medical attendance supplied, or agreed to be supplied or any sum be due for tools or materials supplied, there should be a contract in writing, by which the workman agrees that deductions for those things should be made. I do not think the contract under which the sums became due need be in writing. I think it is sufficient if the artificer agrees that the sums which do become due under the contract under which they are supplied should be deducted. If this were not the true construction of the section, it would be practically useless; for it would be almost impossible beforehand to foretell what particular tools, or what the real value of them would be, which the master might have to supply to his workmen as the old ones got broken, or what particular medicine or amount of medical attendance would be rendered necessary by the state of his health. I think, therefore, it is sufficient if there be a contract in writing which states in general terms that the charges for the things mentioned in s. 23 may be deducted from the wages, and the amount of these actual deductions may be shewn by parol evidence. Now there is such a general agreement by the rules; but in addition to the rules, there is a parol agreement by which the plaintiff agreed to pay 6*d.* a week to the defendant, and which 6*d.* was to be deducted from his wages, towards the funds of a club managed by the defendant, and the defendant agreed that if the plaintiff, while he was in health and in his employment, paid the 6*d.*, he would supply the plaintiff with the requisite medicine and

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medical attendance if he were ill. If the contract were bonâ fide made, it is certainly a reasonable contract. Section 23 provides that nothing in the act shall prevent any employer from supplying or contracting to supply to any artificer any medicine or medical attendance, nor from making any stoppage or deduction from the wages of any artificer in respect of any *such* medicine or medical attendance: this is a deduction made for medicine and medical attendance supplied or contracted to be supplied, and it seems to me to be within the words of the section.

The next question is as to the deduction for rent. The objection made to this is, that the amount of rent is due under the demise, which is a separate agreement and not incorporated in the contract in writing, signed by the plaintiff, and which provides that the deduction shall be made. The same reasoning applies to this as to the deduction for medical attendance. The amount of rent due may be ascertained dehors the contract. On these two items of rent and medical attendance the plaintiff fails, and as to those the rule must be discharged.

As to the deduction of 8*s.* 6*d.* for wood, the plaintiff is a miner, and it is expressly provided by s. 23 that the employer may supply to an artificer who is a miner any materials, tools, or implements, to be by such artificer employed in his trade. The wood technically called "sprags" cannot come within the words "tools or implements;" but I think it may be considered as "materials;" and if the plaintiff had been bound to supply sprags for the purpose of propping up the mine, and had bought them on credit from the defendant, then the amount might be deducted. The section provides that such deduction shall not exceed the real and true value of such materials, which shews, as my Brother Bramwell pointed out in his judgment in *Archer* v. *James* (1), that what the legislature contemplated was a sale out and out, and not a contract for hiring materials, by which the employer agreed to supply his own materials, and the workmen engaged to return them, and to pay him a sum of money as security against waste or breakage. Such a contract would, in my opinion, not be an exception within s. 23, but would come within the general provisions of the act. In the present case the evidence has left the

(1) 2 B. & S. at p. 94; 31 L. J. (Q. B.) at p. 165.

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contract under which the deduction was to be made in great obscurity, and I think it lay upon the defendant to shew that the deduction claimed was one which was authorized by the section. It appears by my Brother Mellor's note of what took place at the trial that the plaintiff's counsel relied on the fact that the money claimed for the wood was kept back as a security to provide against breakages or waste of the wood by the miner. The evidence, however, does not appear to have been very precise on the point. It clearly lay on the defendant to make out by facts that it was a legal deduction; and it is enough to say that he has not made that out. The plaintiff, therefore, is entitled to succeed as to this item.

MELLOR, J. I am of the same opinion. I certainly at the trial was rather inclined to think that the amount of the deductions ought to be specified in the written contract. There would be some reason for saying that, as the legislature intended to protect the workmen, they required the amount of the items to be specified: for without it the protection would not be complete. After the argument, however, I am of opinion that the amount of the deductions need not be specified in the contract. I think what the statute meant to guard against was, that the contract which is made shall not be dependent upon any oral understanding or on any usage of the trade, but that there should be in writing a specific agreement between the workman and the master, that it shall be lawful to make deductions or stoppages in respect of things within the act, and which the act enables the master to supply; and therefore it is only necessary that the actual thing, in respect of which the workman consents there shall be deductions from his wages, shall be inserted in the contract.

A plausible objection was taken as to the medicine supplied. The fact is, that the plaintiff is a member of the Foresters' Club, and in case of illness would obtain medicine from that source. It might, therefore, be that the defendant might never be called upon to supply the plaintiff with medicine. It was therefore contended that a deduction for medicine could not be made unless the medicine was actually supplied; but when the

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words of the statute are examined it is clear that the master may supply or contract to supply medicine or medical attendance to his workmen, and contract to make a deduction from his wages for *such* medicine or medical attendance, that is, medicine or medical attendance supplied or contracted to be supplied. It seems to me that it is better for the workman, instead of having to pay at once for his medicine and medical attendance after his illness, that he should pay from time to time a small sum by way of insurance as it were; and I think, for the reasons given by my Brother Blackburn, that the amount to be deducted need not be mentioned in the contract. The words of the proviso at the end of s. 23 are, "unless the agreement or contract for such stoppage or deduction shall be in writing," not "the amount for such stoppage." It is enough if the nature of the stoppage or deduction be shewn in the agreement.

My Brother Lush, who heard the argument on behalf of the defendant, agrees with me that the sum of 8*s.* 6*d.* for wood cannot form an item of deduction, for the reasons given by my Brother Blackburn. So far, therefore, the plaintiff is entitled to succeed; but as to the other two items our decision is in favour of the defendant.

Rule discharged. (1)

Attorney for plaintiff: *J. Briggs.*

Attorneys for defendant: *Palmer, Palmer, & Bull, for Busby, Chesterfield.*

(1) On a statement of the accounts it was ascertained that, after allowing the 8*s.* 6*d.* to the plaintiff, the balance was still against him.

IN THE MATTER OF AN ARBITRATION BETWEEN JOHN MASON HOPPER, WILLIAM BARNINGHAM, AND JOHN WRIGHTSON.

Jan. 17.

Arbitration, within Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 17—*Umpire, Appointment of, by Lot, Execution of Appointment of* —*Misconduct of Umpire.*

A lease of a farm for a term stipulated that, in the event of a sale of the premises during the term, the tenant upon notice should quit and deliver up possession to the landlord, and in such case each party should appoint a valuer to estimate the compensation to be given to the tenant for so quitting. The premises having been sold, the amount of compensation to be paid to the tenant was, by deed between the parties, submitted to the award of *A.* and *B.*, or such third person as they should appoint umpire under their hands, to be indorsed on the submission before proceeding to value, with power to examine witnesses, &c. :—

Held, that the reference was not merely to ascertain the amount of compensation or value to be paid to the tenant in the nature of an appraisement, but was an arbitration, within s. 17 of the Common Law Procedure Act, 1854.

Each of the two arbitrators named an umpire, and each agreed that the umpire named by the other was a fit person ; but not being able to agree which of the two nominees should be appointed, they decided the choice by lot :—

Held, in accordance with *Neale* v. *Ledger* (16 East, 51), that the appointment of umpire was valid.

The arbitrators, having thus decided upon the umpire to be appointed, agreed to meet to indorse the appointment on the submission ; one only attended, and he signed the appointment and forwarded it to the other, who signed it the next day :—

Held, that the arbitrators having previously agreed upon the umpire, the indorsing the appointment on the submission was not a judicial act, and need not be done by the arbitrators at the same time.

After the last meeting had been held, the two arbitrators, the umpire, and the attorney of W. (one of the parties), dined with W. at his invitation, the umpire having afterwards made his award in favour of W. :—

Held, that although this proceeding was very improper, it was not sufficient ground for setting aside the award, or for refusing to enforce it by rule, as it did not appear that there was any intention to corrupt or influence the umpire, or that he had been influenced.

A RULE having been obtained by John Wrightson calling upon William Barningham to shew cause why he should not pay to John Wrightson two sums of money, pursuant to an award made between the parties and the Master's allocatur, a cross rule was obtained by Barningham, calling upon Wrightson and John Mason Hopper to shew cause why the award or umpirage made between

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the parties should not be set aside on the following grounds:—First, that the umpire was chosen by lot; secondly, that the appointment of umpire was not signed by the arbitrators in the presence of each other, and that the appointment was not made by them together, but apart; thirdly, for misconduct, treating, and corruption of the umpire in hearing statements of one of the parties, to wit, John Wrightson, respecting the matter in dispute, in the absence of William Barningham, and for misconduct in John Wrightson in making such statements.

The following facts appeared from the affidavits. By an agreement, dated the 11th of October, 1861, between J. M. Hopper and J. Wrightson, Hopper agreed to let to Wrightson a farm and a dwelling house—the tillage part of the farm from the 14th of February, the pasture lands from the 6th of April, and the rest of the premises from the 13th of May—at a certain rent, for a term of seven years. The agreement contained, inter alia, the following clause: "If the premises agreed to be demised, or any part thereof, shall, during the term, be sold, then, and in such case, J. Wrightson shall, if required by J. M. Hopper, or the owner for the time being, quit and deliver up the same at the expiration of six calendar months, provided J. Wrightson shall have had due notice of such sale; and then, and in such case, each party shall appoint a valuer, such valuers to estimate the compensation to be given to J. Wrightson for so quitting or giving up; and in case the parties shall disagree in their valuation, they shall, before proceeding to value as aforesaid, name an umpire, whose decision shall be binding."

During the term, the farm was sold by Hopper to William Barningham, and due notice was given to Wrightson.

On the 5th of January, 1866, by deed made between Hopper, Barningham, and Wrightson, which recited the sale of the farm to Barningham, and that it had been agreed that he should appoint a valuer instead of Hopper, the amount of compensation to be paid to Wrightson for quitting and delivering up the demised premises was referred to the award of G. Stratton, the arbitrator appointed by Barningham, and C. S. Bell, the arbitrator appointed by Wrightson, and in case the two arbitrators should disagree, then to the umpirage of such person as Stratton and Bell should,

in writing under their hands, by indorsement on the deed (before proceeding to value), appoint in that behalf. The deed contained clauses giving power to the arbitrators, or umpire, to examine the parties and their witnesses touching the matters referred, and the parties agreed to produce at the reference all such books, papers, plans, and documents, in any way relating to the matters in difference as were in their respective custody.

The arbitrators, before proceeding to value, met for the purpose of appointing an umpire. Stratton proposed J. Parrington for umpire, and Bell proposed W. Johnson. The arbitrators agreed that the two persons proposed as umpire were fit and proper persons to be appointed, but neither arbitrator would consent to appoint the nominee of the other; they, therefore, agreed to write the names of Parrington and Johnson on two slips of paper and place them in a hat, and he whose name should be drawn should be appointed umpire. This was accordingly done, and Johnson's name was drawn.

A meeting, for the purpose of signing the appointment of the umpire by the arbitrators, was fixed; Bell alone attended, but Stratton, having telegraphed to him to say that he had missed the train and was unable to be present, Bell signed the appointment and forwarded it to Stratton, who signed it the next day.

Bell estimated the compensation to be paid to Wrightson at 1224*l.*, and Stratton at 750*l.* The matter was, therefore, referred to the umpire, who held several sittings, at which the arbitrators and the parties, together with their counsel, attended, and evidence was given by and on behalf of both parties; and on the 31st of May the arbitrators and the umpire met to consider the evidence. After this meeting, the arbitrators, the umpire, and Wrightson's attorney, dined, at the invitation of Wrightson, with him at an inn kept by him. Much wine was drunk, many allusions made to the reference, and the umpire, in consequence of excess, was obliged to sleep at the inn. The umpire afterwards made his award in favour of Wrightson, for 1020*l.* 6*s.* 8*d.*

The submission having been made a rule of court (1), the two rules were obtained.

(1) Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 17.

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Field, Q.C., and *Philbrick*, for Wrightson. There is a preliminary objection, which, if valid, will dispose of the matter. This is not an arbitration over which the Court can exercise any authority under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 17. The landlord and tenant have made an agreement by which the landlord can, in a given event, by proper notice, determine the tenancy, and the tenant is to be paid compensation, to be settled by two valuers. There is therefore no difference in dispute between the parties; it is a mere mode of ascertaining what amount of compensation the tenant shall receive. It is not an arbitration, but an appraisement. In *Leeds* v. *Burrows* (1) the plaintiff sold the defendant a stack of hay, which was to be valued by two valuers. The Court held that their decision was an appraisement and not an award. So an agreement to sell land at a price to be fixed by arbitrators was held not to be a submission to arbitration within 9 & 10 Wm. 3, c. 15: *Lee* v. *Hemingway*. (2) So where in a contract for the purchase of a brewery it was agreed that the purchase money should be determined by two arbitrators, it was held that this was not an arbitration within the meaning of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125): *Collins* v. *Collins* (3); and this decision was acted on in the Court of Exchequer in *Bos* v. *Helsham* (4), where it was held that a reference to ascertain the quantum of compensation only was not a reference to arbitration of an existing or future difference within the same act.

[COCKBURN, C.J. If a reference is made to a person to state what is the value of a stack of hay or the plant of a brewery, and he has only to use his eyes, so to speak, to ascertain the value, that may not be an arbitration; but if the matter referred be one on which a judicial decision must be exercised, on which parties are heard and witnesses are examined, it is clearly an arbitration.

BLACKBURN, J. The argument would go the length of establishing that what are known as "compensation cases" are not arbitrations.]

To proceed then to the objections to the award. The first is,

(1) 12 East, 1.
(2) 3 N. & M. 860; 15 Q. B. 305 n.
(3) 28 L. J. (Ch.) 184; 26 Beav. 306.
(4) Law Rep. 2 Ex. 72.

that the umpire was chosen by lot. Each arbitrator, however, had agreed that the nominee of the other was a fit person to be an umpire, and the mode adopted was merely to decide which of two fit persons should act. *Neale* v. *Ledger* (1) is directly in point. No doubt if the arbitrators had exercised no judgment in the selection of the umpire, and it was a mere selection by lot, the appointment would be bad: *Re Cassell* (2); *European and American Steam Shipping Company* v. *Croskey*. (3) The second objection is, that the two arbitrators did not sign the appointment of umpire at the same time. The arbitrators had made up their minds as to the umpire to be appointed, and in signing the appointment afterwards they merely carried out the decision at which they had already arrived; the appointment therefore is good.

[BLACKBURN, J. *Wade* v. *Dowling* (4) and *Stalworth* v. *Inns* (5) decide that the parties are entitled to the last moment to have their case considered, so that they may have the joint judgment of the arbitrators at the very time the judicial act is done.]

The parties have had the concurrent judgment of the two arbitrators in selecting the umpire, which is the judicial act; what was done afterwards was merely recording the decision. The last objection is, that the award is bad, owing to the misconduct of the umpire. The proceeding complained of does not shew any corrupt motive; nor is any corruption charged or proved.

Dowdeswell, Q.C., contrà. With regard to the last point, the conduct of the umpire is quite inconsistent with the position he held; and on the facts disclosed in the affidavits the award ought to be set aside. As to the first objection, no doubt *Neale* v. *Ledger* (1) is an authority in favour of the other side; but that case must be considered as overruled by *Re Cassell* (2), which is a direct authority that an appointment by chance, not choice, is bad. It is also at variance with *Ford* v. *Jones*. (6)

[BLACKBURN, J. In *European and American Steam Shipping*

(1) 16 East, 51.
(2) 9 B. & C. 624.
(3) 29 L. J. (C.P.) 155; 8 C. B. (N.S.) 397, 6 Jur. N.S. 896
(4) 4 E. & B. 44; 23 L. J. (Q.B.) 302, 18 Jur. N.S. 728
(5) 2 D. & L. 428; 13 M. & W. 466.
(6) 3 B. & Ad. 248.

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Company v. *Croskey* (1) the Court of Common Pleas held that *Neale* v. *Ledger* (2) was well decided.]

As to the separate signing of the appointment of the umpire, *Wade* v. *Dowling* (3) is an authority that this objection must prevail. On signing an award all the parties should be together, and do the act of execution simul et semel. The appointment of an umpire is a judicial act. The considered judgment of this Court in *Lord* v. *Lord* (4) is precisely in point. The Court say: "It appears to us that what is true of the execution of the award by arbitrators is equally true of their appointment of an umpire. This is a judicial act of the last importance to the parties who intrust them with the absolute power of constituting the judge who is to decide the controversy between them, about whose appointment the arbitrators may differ up to the last moment, and about which the parties have a right to the exercise of their joint judgment up to its entire completion." Here the parties had not the joint judgment of the arbitrators up to the time of signing the appointment; it is therefore void. At all events, the Court will not enforce the payment of the sum awarded in a summary way, but will leave the parties to raise the question in an action.

[BLACKBURN, J. None of the cases decide that, when two arbitrators have exercised their judgment in the selection of an umpire, the recording of their decision is a judicial act, which ought to be performed in each other's presence.]

COCKBURN, C.J. The first question in this case arises on a preliminary objection taken by Mr. Field, that strictly this is not an arbitration over which the Court has jurisdiction. The authorities cited by him no doubt establish the proposition that, where the matter to be determined by the referee is merely one of value, that is not, strictly speaking, an arbitration. I am not at all disposed to quarrel with the cases of *Collins* v. *Collins* (5) and *Bos* v.

(1) 8 C. B. (N.S.) 397; 29 L. J. (C.P.) 155;

(2) 16 East, 51.

(3) 4 E. & B. 44; 23 L. J. (Q.B.) 302;

(4) 5 E. & B. 404, 407; 26 L. J. (Q.B.) 34.

(5) 28 L. J. (Ch.) 184; 26 Beav. 306,

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Helsham (1), looking at the facts upon which they were decided; but I think they must not be taken to comprehend every case of compensation or value; as where, in ascertaining the value of the property or amount of compensation to be paid, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles upon which judicial inquiries are conducted, by hearing the parties and the evidence of their witnesses. If it be the intention of the parties that their respective cases shall be heard, and a decision arrived at upon the evidence which they have adduced before the arbitrator, it would be taking too narrow a view of the subject to say that, because the object to be arrived at was the ascertaining of the value of property or the amount of compensation to be paid, the matter was not properly to be considered as one of arbitration. I cannot give a better illustration of the inexpediency of laying down as a general proposition, where a question of value or compensation is involved, that it is not to be treated as a judicial inquiry, than the case we have now before us. By the lease, which was for a term of seven years, the interest of the tenant may be at any time terminated by the landlord, and it is agreed that, in the case of an abrupt termination of the lease, the tenant shall be entitled to compensation, and that compensation shall be ascertained by two arbitrators, and, if they cannot agree, by an umpire to be appointed by them before entering upon the arbitration. The claim is one upon which it is quite obvious that the evidence of surveyors and of persons conversant with the value of real property under lease would be most important, and upon which the greatest difference of opinion might exist. Upon the termination of the tenancy, the value of the dwelling-house and farm would be lost to the tenant for the remainder of the term, and it is quite clear that there would be many items of account and of value, upon which it would be necessary to hear the evidence of qualified persons in order to arrive at a sound conclusion. In this very case we hear that the arbitrators differed considerably in their views, that they and the umpire were attended by counsel, that they received evidence, and the case was gone into and carefully considered. To say that such a case is not to be treated as an arbitration, and does not fall within the rules of law

(1) Law Rep. 2 Ex. 72.

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which are applicable to arbitrations, appears to me to be going too far. Therefore I think that the proposition that, where value or compensation only is involved, the matter is not to be treated as an arbitration, must depend upon the particular circumstances of each particular case.

Assuming then that we have jurisdiction over the matter, the next question is, whether the award ought to be set aside on the ground of the misconduct of the arbitrators and umpire. Looking at all the circumstances of the case, I do not think sufficient ground is shewn for setting the award aside. It appears the proceedings of the arbitration being over, all the evidence being closed, the parties by their counsel having been heard, and nothing remaining but for the umpire to make up his mind and make his award, it so happened that one of the parties, being an innkeeper in the town, proposes to the two arbitrators, the umpire, and his own attorney, to dine with him, and that proposal is accepted. At that dinner, so far as the umpire is concerned, there appears to have been some excess, and he is afterwards found to be intoxicated, and obliged to remain in the inn. No doubt all this was extremely improper and unbecoming. It is to be very much regretted that any one who has to exercise judicial functions should place himself in the position of appearing under an obligation to one of the parties, even in respect of hospitality; because a person who has to administer justice should be above suspicion, and therefore I cannot help regretting that that course of proceeding should have been adopted. But the question is, whether upon that ground we should set aside the award. If it could be made clear that the object of Wrightson, one of the parties, in inviting the arbitrators and umpire to go and partake of the hospitalities at his house, had been to corrupt the umpire, or if we could see that the hospitalities thus bestowed upon the umpire had that effect, and had in any way influenced the award that he made, I quite agree that would be a very sufficient reason for setting aside this award, or at all events for refusing to enforce it summarily; but I cannot believe, looking at all the circumstances, that the object and intention of Wrightson was to corrupt the umpire, and I do not see the slightest reason for supposing that the umpire was in any way influenced by the

hospitality he had received. The claim is one which, it appears, Wrightson's arbitrator put at 1224*l.*, and the other at 750*l.*; the final award was made for 1020*l.* I think, therefore, as to that ground of objection, our decision should be in favour of the award.

Then comes the question as to whether there has been such an appointment as to give jurisdiction to the umpire; and what appears to be the case is, that the two arbitrators, not being able to agree in the appointment of an umpire, did cast lots as to which of two persons should be appointed; but then, before they did that, they each agreed that the man proposed by the other was a fit and proper person to be umpire, and to discharge the duties which would be thrown upon him. We have it, therefore, that undoubtedly there was a concurrent judgment as to the fitness of the person who was finally appointed; and when the arbitrators have come to such a concurrence as to the fitness of either of two persons for the office of umpire, and the only difference between them is as to which of the two they shall appoint, and the appointment is settled by lot, such a case falls directly within the decision of *Neale* v. *Ledger* (1),—a case upheld by the Court of Common Pleas in *European and American Steam Shipping Company* v. *Croskey* (2), where Erle, C.J., in pronouncing the judgment of the Court, distinguishes it from *Ex parte Cassell* (3), and says that *Neale* v. *Ledger* (1) ought to be upheld in any case in which the facts are the same. A similar point came before the Court in *Morgan* v. *Boult* (4), where all the cases now cited were mentioned, and this Court, acting on *Neale* v. *Ledger* (1) and *European and American Steam Shipping Company* v. *Croskey* (2), came to the same conclusion. I would observe that we must not be over ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding, and that the parties have not had the benefit of the judgment of the arbitrators in the appointment of a fit and proper person as umpire. It cannot be said that the parties have

16 Q.B. 23.

(1) 16 East, 51.
(2) 8 C. B. (N.S.) 397; 29 L. J. (C.P.) 155, 6 Jur. N.S. 896
(3) 9 B. & C. 624.
(4) 1 New Rep. 271.

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had that advantage where the whole matter is left to chance by tossing up or drawing lots; but where there is a concurrent judgment expressed by the arbitrators that the person eventually appointed is a fit person, there is no reason why, because they have determined by lot between A. and B., each equally fit, the award should be set aside.

The last point made is, that the two arbitrators should have signed the appointment of the umpire at the same time. If one of the arbitrators signs the appointment of the umpire and sends it to the other, who is indifferent as to who is appointed, or even if he agrees in the propriety of the appointment, if the arbitrators have never met and exercised their functions together judicially, then I agree that the appointment would be invalid. That was held in *Lord* v. *Lord*. (1) In that case the arbitrators never exercised their discretion and judgment in the choice of the umpire. I therefore think that that case is clearly distinguishable. Signing the appointment of umpire is not a judicial act; the judicial act is the agreement as to the appointment of the particular person who is to be the umpire, and the signing is merely the record of that which they have already done in the judicial exercise of their functions.

I think, therefore, that all the objections to the award fail, and that we ought to make the rule for the payment of the money absolute.

BLACKBURN, J. The cases of *Collins* v. *Collins* (2) and *Bos* v. *Helsham* (3) go to this extent: that where compensation is to be settled by a particular person, that is not necessarily an award. In that I quite agree. An appraisement is not necessarily an award. If those cases are to be supposed to go so far as to decide that an agreement to assess compensation and ascertain value could not be a matter of arbitration and there could be no award, I should certainly pause before I concurred in them. In the present case it is plain that if ever there was a matter requiring judicial determination this is that case. The parties met, several meetings were held,

(1) 5 E. & B. 404; 26 L. J. (Q.B.) 34.
(2) 26 Beav. 306; 28 L. J. (Ch.) 184.
(3) Law Rep. 2 Ex. 72.

and the evidence of numerous witnesses taken, and it was a matter really involving judicial decision. I think, therefore, the agreement was a submission to arbitration, and that we have jurisdiction.

With regard to the misconduct of the umpire, I have nothing to add to what my Lord has said.

As to the objection that the umpire was chosen by lot, I think the facts of the present case bring it within *Neale* v. *Ledger*. (1) Each arbitrator having exercised his judgment in the selection of an umpire, and both being agreed as to the fitness of the persons named, they draw lots merely to decide which of the two men shall be appointed; and to that I see no objection. In *Re Cassell* (2) the facts were not the same. In *European and American Steam Shipping Company* v. *Croskey* (3), the Court expressed an opinion that *Neale* v. *Ledger* (1), was a sound decision, and I cannot see the slightest reason for departing from it.

The last objection was, that the appointment of umpire was not signed by the two arbitrators at the same time. Several cases were cited in support of this objection, but not one of them was precisely in point. No case has decided that, where two arbitrators have exercised their judgment in the selection of an umpire, their not being present together at the mere formal act of afterwards recording the appointment vitiates it, and to uphold this proposition would be to adhere to the letter of the law instead of to the substance. I think there is an analogy to be found in the case of a bill of exceptions. The bill of exceptions must be tendered to the judge before the jury give their verdict, and it must be in writing and sealed by the judge; but in practice this is never strictly carried out. A note at the time is taken of the exceptions, and the bill is prepared and sealed afterwards; and I never heard of an objection being taken to the bill of exceptions because it was sealed after the verdict was given.

On the whole, I think we shall be doing no injustice in enforcing this award, and I think the rule to pay the money ought to be made absolute.

(1) 16 East, 51. (2) 9 B. & C. 624.
(3) 8 C. B. (N. S.) 397; 29 L. J. (C.P.) 155.

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LUSH, J., expressed his entire concurrence in what had been said by the other members of the Court.

Rule absolute to pay the money.
Rule to set aside the award discharged.

Attorneys for Wrightson: *Clarke, Son, & Rawlins.*
Attorneys for Barningham: *Cree & Last.*

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

EASTER TERM, XXX VICTORIA.

THE QUEEN *v.* CUTBUSH AND ANOTHER.

April 26.

Summary Convictions—Justices, Jurisdiction of, in Petty Sessions—Cumulative Sentences, under 11 *&* 12 *Vict. c.* 43, *s.* 25—7 *&* 8 *Geo.* 4, *c.* 28, *s.* 10.

The 11 & 12 Vict. c. 43, s. 25, enacts that when justices shall, upon complaint for any offence punishable upon summary conviction, "adjudge the defendant to be imprisoned, and such defendant shall then be in prison undergoing imprisonment upon a conviction for any other offence," . . . the justices may, if they think fit, "award that the imprisonment for such subsequent offence shall commence at the expiration of the imprisonment to which such defendant shall have been previously sentenced:"—

Held, that where the defendant is summarily convicted at one time of several distinct offences, the justices have power, under the above section, to award that the imprisonment under one or more of the convictions shall commence at the expiration of the sentences previously pronounced.

THIS was a rule calling on two justices of the borough of Maidstone to shew cause why a writ of habeas corpus ad subjiciendum should not issue to the keeper of the house of correction of the said borough to bring up the body of Frederick Paine; and why, in the event of the rule being made absolute, Paine should not be

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discharged out of custody, without the issuing of such writ, and without being brought up personally before the Court.

It appeared from the affidavits that Paine was charged before the justices, on the 10th of December, 1866, with having obscenely exposed his person on the 6th of December, 1866; to this charge he pleaded guilty, and he was remanded; and on the 15th of December he was charged with, and pleaded guilty to, three other similar offences, committed on the 22nd of November, 27th of November, and on the 30th of November, 1866, respectively. The justices adjudged him to be imprisoned in Maidstone house of correction on each of the four charges for three calendar months, with hard labour, under the Vagrant Act, 5 Geo. 4, c. 83, s. 4, that being the maximum punishment for the offence. The warrants of commitment, as to the offences on the 22nd and 27th of November and 6th of December, simply awarded three months' imprisonment, but the warrant, as to the offence on the 30th of November, awarded imprisonment for the space of three calendar months, "to commence at the expiration of the first term of three calendar months' imprisonment to which he has this day been adjudged by us the said justices."

April 25. *W. C. Sleigh* shewed cause. The 11 & 12 Vict. c. 43, s. 25 (1), clearly gives the justices the same discretionary power to inflict consecutive or cumulative sentences on summary convictions at the same time for several offences, as the 7 & 8 Geo. 4, c. 28, s. 10 (2), gives to the criminal courts on convictions for felony, under which statute the courts are constantly in the habit of making a second sentence run from the expiration of a former one.

(1) 11 & 12 Vict. c. 43, s. 25: "Where a justice or justices of the peace shall, upon any such information or complaint as aforesaid," (for any offence punishable upon summary conviction), "adjudge the defendant to be imprisoned, and such defendant shall then be in prison undergoing imprisonment upon a conviction for any other offence, the warrant of commitment for such subsequent offence shall in every such case be forthwith delivered to the gaoler to whom the same shall be directed; and it shall be lawful for the justice or justices issuing the same, if he or they shall think fit, to award and order therein and thereby, that the imprisonment for such subsequent offence shall commence at the expiration of the imprisonment to which such defendant shall have been previously adjudged or sentenced."

(2) 7 & 8 Geo. 4, c. 28, s. 10: "Wherever sentence shall be passed

[BLACKBURN, J. That statute was passed to give the courts the same power in cases of felony as they had at common law in misdemeanors: see *Rex* v. *Wilkes*. (1)]

Ribton, in support of the rule. The language of the two statutes is materially different. The construction put upon the language of the earlier act is very forced; but it is impossible to say that, as soon as a man has merely been sentenced, he is "in prison undergoing imprisonment upon a conviction for another offence." If the construction put upon the statute by the justices be the true one, it will enable two justices to inflict, on the whole, for several offences under the 5 Geo. 4, c. 83, s. 4, a larger measure of punishment than the quarter sessions can inflict, under ss. 5 and 10, for subsequent offences after a previous conviction. This anomaly was never intended by the legislature.

Cur. adv. vult.

April 26. The judgment of the Court (Cockburn, C.J., Blackburn and Lush, JJ.) was delivered by

COCKBURN, C.J. In this case the question was, whether on summarily convicting a man under the Vagrant Act (5 Geo. 4, c. 83, s. 4), for several distinct offences, in respect of each of which the maximum punishment is three months' imprisonment only, the justices had power to award two or more sentences of three months' imprisonment, and make one to commence at the expiration of the others. Inasmuch as the 25th section of 11 & 12 Vict. c. 43, on which the question turns, is an enactment in substance similar to that of 7 & 8 Geo. 4, c. 28, s. 10, which gives a similar power to the criminal courts on several convictions for felony,

for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of transportation, the Court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced; although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded."

(1) 4 Burr. at p. 2574.

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we thought it important to ascertain from our brother judges what had been, so far as living judicial memory goes back, the practice of the judges under the act of 7 & 8 Geo. 4, c. 28. We have just had a consultation with the rest of the judges, and the result of that consultation is, that as far back as living judicial memory can go, we find the practice of judges has been, acting, of course, under the powers given in the enactment to which I have referred, where more than one case of felony was established against a man and he was convicted of them at one and the same time, to make the sentence of imprisonment for the two or three offences, as the case might be, commence at the expiration of the sentence first awarded.

Now, inasmuch as that appears to have been for so long a series of years the practice of the judges at the Central Criminal Court and upon the circuits, we must take it as affording a contemporaneous exposition of the effect of the 10th section of 7 & 8 Geo. 4, c. 28; and inasmuch as the 25th section of 11 & 12 Vict. c. 43, is, although it varies somewhat in its language, substantially the same as that of the former act, and, no doubt, was intended to give justices the same power to make the sentence of imprisonment given upon a summary conviction for a second offence commence at the expiration of the first, and inasmuch as (though, it is true, by some degree of technical straining) the words are capable of that interpretation, and imprisonment may be said to commence, and the man may be said to be imprisoned from the moment he is convicted of the first offence and sentenced to imprisonment under it, and also as right and justice require, when a man has been guilty of separate offences, for each of which a separate term of imprisonment is a proper form of punishment, that he should not escape from the punishment due to the additional offence, merely because he is already sentenced to be imprisoned for another offence, and as it would be contrary to public policy and expediency that he should so escape with but one punishment; looking at it, I say, on the whole, in the first place, with reference to what is the fairly possible construction of the 25th section of 11 & 12 Vict. c. 43; secondly, to what justice and expediency require; and then to the light which is thrown on what ought to be the construction of the statute by the long

practice that has prevailed under the similar and corresponding enactment of the former statute—looking at all the matters in all these different points of view, it appears to us that we shall be putting the right and proper construction on the section of the act of parliament we have to construe, by holding that the justices in making the second sentence commence at the expiration of the first acted within their jurisdiction; and the jurisdiction having been properly exercised, the rule for discharging the defendant out of custody must be discharged.

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Rule discharged.

Attorneys for prisoner: *Chilton, Burton, & Co., for Ellman & Tanner, Rye.*

Attorneys for justices: *Braikenridge & Sons, for Case, Maidstone.*

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF THE TOWNSHIP OF HUNSLET, RESPONDENTS *v.* THE GUARDIANS OF NORTHWICH UNION AND THE OVERSEERS OF THE TOWNSHIP OF DARNHALL, APPELLANTS.

May 1.

Poor—Removal—Union Chargeability Act, 1865 (28 & 29 *Vict. c.* 79), *ss.* 1 & 2 —*Form of Order when Removing Parish not in Union formed under* 4 & 5 *Wm.* 4, *c.* 76, *s.* 26.

The Union Chargeability Act, 1865, s. 1, only applies to a union formed under 4 & 5 Wm. 4, c. 76, s. 26; and s. 2 is confined to the case of a pauper relieved in *such* a union. Where, therefore, a pauper is chargeable to a parish, which is not united with any other parish, and in which the poor laws are administered by a board of guardians under 4 & 5 Wm. 4, c. 76, s. 39, the order of removal is rightly made, as if the act of 1865 had not passed, on complaint of the overseers of the removing parish, and rightly addressed to the overseers of the parish of settlement, although the latter parish is in a union formed under 4 & 5 Wm. 4, c. 76, s. 26.

UPON appeal to the quarter sessions for the borough of Leeds against an order for the removal of John Kettle, his wife, and children, from the township of Hunslet to the township of Darnhall, as their last place of settlement, the recorder confirmed the order, subject to a case.

The township of Hunslet, in the borough of Leeds, is a township

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which is not united with any other township for poor law purposes, and in which the laws for the relief of the poor are administered by a board of guardians, under an order of the Poor Law Board, dated the 6th of September, 1862, and made by virtue of 4 & 5 Wm. 4, c. 76, s. 39. There are also overseers of the poor of the township of Hunslet appointed annually by the magistrates.

The township of Darnhall is comprised within the Northwich Poor Law Union, a union of parishes and townships formed under the 4 & 5 Wm. 4, c. 76, s. 26. There are overseers of Darnhall duly appointed.

The order appealed against bears date the 18th of April, 1866, and was made upon a complaint by the overseers of the poor of the township of Hunslet, and was directed to them and to the "churchwardens and overseers of the poor of the parish, township, or place of Darnhall." The Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), came into operation on the 25th of March, 1866; and it was objected by the grounds of appeal that, as the order had been made after this act became law, it ought to have been directed to the guardians of the poor of the Union of Hunslet and to the guardians of the poor of the Northwich Union, of which the township of Darnhall forms part.

The notice and grounds of appeal were signed by the clerk to the guardians of the Northwich Union, and also by the overseers of Darnhall.

The respondents, in answer to this objection, contended that Hunslet was not in a Union, and that therefore the Union Chargeability Act, 1865, did not apply to orders of removal obtained by Hunslet, and that the order was rightly made.

The question for the opinion of the Court was, whether the order was rightly made upon the overseers of Darnhall.

West, for the respondents. The order was rightly made. Section 1 of the 28 & 29 Vict. c. 79 (1) in express terms applies only to a union of parishes formed under the 4 & 5 Wm. 4, c. 76, s. 26, and therefore

(1) 28 & 29 Vict. c. 79, s. 1. "From and after the 25th of March, 1866, so much of the 26th section of 4 & 5 Wm. 4, c. 76, as requires that each of the parishes in a union formed under the authority of that act shall be separately chargeable with, and liable to defray, the expense of its own poor, whether relieved in or out of the workhouse of such union, shall be repealed;

such union in s. 2 can only mean a union of parishes; and the case of a parish or township like Hunslet, which is not in such a union, is not within the enactment; consequently the order of removal must be made as this was, as if the 28 & 29 Vict. c. 79, had not passed.

Hannay, for the appellants. The words used in 28 & 29 Vict. c. 79, are, by s. 16, to be interpreted in the manner prescribed by 4 & 5 Wm. 4, c. 76; and by s. 109 of that act "union" "shall be construed to include any number of parishes united for any purposes whatever under the provisions of this act, or incorporated under 22 Geo. 3, c. 83, or incorporated for the relief or maintenance of the poor under any local act." "Union," therefore, in 28 & 29 Vict. c. 79, is not confined to a union formed under s. 26 of the act of Wm. 4.

[BLACKBURN, J. That definition would not include Hunslet, which is a township, with a board of guardians, under s. 39 of 4 & 5 Wm. 4, c. 76; but, moreover, s. 2 of the 28 & 29 Vict. c. 79, only applies to a pauper relieved in any *such* union, and the union mentioned in s. 1 is clearly a union of parishes under the act of Wm. 4.]

A reasonable construction must be put upon the act so as to embrace all cases, and give those parties the opportunity of appealing who are really aggrieved by the removal: *Leeds* v. *Wake-*

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and all the cost of the relief to the poor, and the expenses of the burial of the dead body of any poor person under the direction of the guardians, or any of their officers duly authorized, in such union thenceforth incurred, and all charges thenceforth incurred by the guardians of such union in respect of vaccination and registration fees and expenses, shall be charged upon the common fund thereof."

s. 2. "When any pauper relieved in any such union shall be settled in any parish situated in another union, or subject to a board of guardians, and shall not be exempt from removal by reason of any provision of the law, the guardians of the union to which such pauper shall be chargeable may obtain an order of removal addressed to the guardians of the union or parish, or the overseers of the parish, as the case may require, in which such pauper shall be settled, and the guardians of such last-mentioned union or parish shall receive such pauper in like manner and subject to the like incidents and consequences, as in the case of orders of removals heretofore obtained by overseers, with such modifications as may be necessary to meet the circumstances of the chargeability to the union instead of the parish."

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field. (1) If the removal had been from Darnhall to Hunslet, the order would have been obtained under the statute by the guardians of the Northwich Union, and would have been addressed to the guardians of Hunslet; and it never could have been intended that a different course should be adopted when the removal is from Hunslet to Darnhall. The difficulty is not merely technical. Since the present statute the *parish* officers have no funds to satisfy the order, and the order ought therefore to have been made on the guardians of the Northwich Union, who alone have power to charge the expenses of the relief of the poor to the common fund of the union. On whom is the demand for the expenses on the delivery of the warrant and pauper at the workhouse to be made, under 9 & 10 Vict. c. 66, s. 7, and 14 & 15 Vict. c. 105, s. 13?

BLACKBURN, J. No doubt one of two absurdities must arise from this new piece of legislation. By s. 1 of the Union Chargeability Act, in future, whenever expenses are incurred as to the poor of any parish in a union formed under 4 & 5 Wm. 4, c. 76, the expenses are to be borne by the common fund of the union; and then, by s. 2,—when it would be expected that the legislature would provide for every case arising under this new state of circumstances,—it is enacted that, when any pauper relieved in any *such* union is settled in a parish in another union, or subject to a board of guardians, the guardians of the union to which the pauper is chargeable may obtain an order of removal; the statute, by using the words "in any *such* union," confines the enactment to a union formed under 4 & 5 Wm. 4, c. 76, and is silent as to what course is to be pursued when the pauper is relieved by a parish which is not in such a union, but is either united with other parishes under the 22 Geo. 3, c. 83, or incorporated by a local act, or under a board of guardians, which is the case of the township of Hunslet. The consequence is, either that a parish so situate has now no power to remove the foreign paupers becoming chargeable, so that it must be saddled with the maintenance of all the poor coming into it; or else the power which a parish had to remove before the present statute passed remains untouched; and then the order must be obtained, as the

(1) 26 L. J. (M.C.) 37; 7 E. & B. 258.

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order now in question was, on the complaint of the overseers of the removing parish, and be made on the overseers of the parish of settlement. It is true this may give rise to some practical difficulty as to how the latter parish is to pay the expenses, &c., and obtain re-payment from the union: but that is a minor difficulty; and we can never hold that the respondent township is to be fixed with all the poor becoming chargeable in it. The order of sessions, therefore, appears to me to be right, and must be confirmed.

SHEE, J. I am of the same opinion. The paupers in the present instance were not relieved in any "such" union—that is, a union of parishes formed under 4 & 5 Wm. 4, c. 76. The case is, therefore, omitted from the provisions of the act, and the law as to such a removal remains as it stood before the passing of the Union Chargeability Act.

Order confirmed.

Attorneys for appellants: *C. & C. R. Cuff.*
Attorney for respondents: *Fiddey.*

GRAHAM *v.* ROBINSON.

May 13.

Bankrupt—Liabilities of Bankrupt, under repealed Sections of the Bankruptcy Act, 1849, 12 & 13 *Vict. c.* 106—"*Rights*" *and* "*Penalties*" *reserved by s.* 230 *of Bankruptcy Act*, 1861, 24 & 25 *Vict. c.* 134.

The defendant was adjudged a bankrupt in 1857, and in 1858, his examination having been adjourned sine die without protection, on the ground of his not having fully disclosed his estate, a certificate (in form sch. B a.) under s. 257 of the Bankruptcy Act, 1849, was obtained by the then assignees, and a ca. sa. issued, but the defendant, having left England, was not then arrested. In 1867, another ca. sa. was issued under the same certificate, at the suit of the present official assignee (the other assignees having died) under which writ the defendant was arrested:—

Held, that though the sections of the act of 1849, under which the proceedings were taken, were repealed by s. 230 of the Bankruptcy Act, 1861, the right of the assignees to arrest, and the liability of the defendant to be arrested, were "rights" and "penalties" preserved by the proviso in the repealing section; and the defendant was lawfully arrested at the suit of the present official assignee.

RULE calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriffs of

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London, &c., as to this action, on the ground, first, no matter pending within the meaning of s. 230 of 24 & 25 Vict. c. 134, the ca. sa. having issued after the passing of the act, and another writ already issued in 1858; second, that there was no evidence of the appointment of official assignee; third, no debt owing from the bankrupt; fourth, sufficient security in the hands of the assignee to cover the debts.

It appeared from the affidavits filed on both sides, that on the 28th of May, 1857, the defendant Robinson filed a petition for arrangement in the Court of Bankruptcy, under the Bankruptcy Act, 1849, 12 & 13 Vict. c. 106; on the same day Isaac Nicholson was appointed official assignee in the matter of the petition; on the 29th of July Robinson was adjudged a bankrupt; and on the 12th of August a creditors' assignee was appointed.

On the bankrupt coming before the Court to pass his final examination, on the 24th of February, 1858, it appeared to the commissioner that the examinations of the bankrupt did not fully and truly disclose and discover the estate and effects of the bankrupt, but were wholly insufficient for that purpose, whereupon it was ordered "further examination adjourned sine die, with liberty for bankrupt to apply for a further day to be named whereon to finish his examination, when he shall be prepared to make a full and true disclosure and discovery of his estate and effects." . . . . "Protection from arrest to be granted to the bankrupt for six weeks from this date, not to be renewed, unless on special application and good cause shewn to the Court."

On the 5th of May, 1858, the assignees obtained from the Court a certificate (in form schedule B a.) under s. 257 of the Bankruptcy Act, 1849, for the sum of 1228*l.* 16*s.* 11*d.*, being the amount of debts appearing on the bankrupt's accounts to be owing by him to unsecured creditors.

On the 16th of June, 1858, a ca. sa. was issued upon the certificate, but the sheriff was unable to arrest the bankrupt, he having left England.

On the 30th of January, 1860, W. Pennell was appointed official assignee in the place of Nicholson, deceased; and on the 7th of March, 1867, the plaintiff Graham was appointed in the place of Pennell, resigned, (the original appointment being produced in

court), and the creditors' assignee having also died, Graham became sole assignee.

On the 22nd of March, 1867, another ca. sa. was issued upon the same certificate, at the suit of Graham, and on the 9th of April the bankrupt was arrested.

The defendant alleged that he had paid his creditors in full, and that the plaintiff had attached a verdict which the defendant had obtained in the Admiralty Court, and that the plaintiff had also seized a ship of the defendant; but all this was denied or explained away by the plaintiff himself and other deponents.

W. Murray shewed cause. The sections (256—9) of the Bankruptcy Act, 1849, under which these proceedings against the defendant were taken, are repealed; but by s. 230 of the act of 1861, by which they are repealed, the repeal is not to affect any proceeding pending or any right that has arisen, or may arise, or any penalty incurred, or that may be incurred, in respect of anything done or existing prior to the passing of the act under any part of the statutes repealed. Now, under s. 257 of the act of 1849 (1), the assignees

(1) 12 & 13 Vict. c. 106, s. 256, enacted that "if at the sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the Court that the bankrupt has committed any of the offences hereinafter enumerated, the Court shall refuse to grant the bankrupt any further protection from arrest; and if at any sitting, or adjourned sitting, for the allowance of the certificate of any bankrupt it shall appear that he has committed any of such offences, the Court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection." Then follow "Offences referred to."

s. 257. "That the assignees for the time being of the estate and effects of any bankrupt, when the accounts relating to his estate shall have become records of the Court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from him to his creditors; and every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof; and the Court when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the Court, in the form contained in schedule B a. to this act annexed, and every such certificate shall have the effect of a judgment entered up in one of Her Majesty's Superior Courts of Common Law at Westminster, until the allowance of the certificate of conformity of such bankrupt; and the assignees or the creditor to whom, ac-

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were entitled to obtain (and, indeed, had obtained) a certificate, and to issue execution against the defendant, they had therefore a "right," and the defendant had incurred the liability to be arrested, which is in the nature of a punishment or a "penalty" for his misconduct. Whether, therefore, this was a proceeding pending or not is immaterial. In *Ex parte Crole* (1) the Lord Chancellor points out the position of the parties.

[BLACKBURN, J. My Brother Mellor has reminded us of the case of *Reg.* v. *Smith* (2), which is directly in point.]

As to the other grounds suggested in the rule. By s. 258 the assignees for the time being are authorized to issue execution under a certificate granted to former assignees. The original appointment of the plaintiff is in court; and it is sworn that the creditors' assignee is dead, the plaintiff therefore is sole assignee for the time being. The payment of his debts by the bankrupt is denied by several of the creditors, and the plaintiff explains that he has not security sufficient to cover the unsecured debts, and if he had, application should be made to the Court of Bankruptcy.

Woollett, in support of the rule. This is not a "proceeding pending." The certificate and a ca. sa. were issued before, this ca. sa. is issued since, the act of 1861. A second ca. sa. ought not to have issued.

[BLACKBURN, J. I cannot see why not.]

Reg. v. *Smith* (2) is distinguishable; there the bankrupt's de-

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cording to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt; and the production of any such certificate to the proper officer of any such superior court shall be sufficient authority to him to issue and seal such writ."

By s. 258, "The assignees for the time being may issue and enforce execution upon any such certificate . . . as fully . . . . as the assignees to whom it shall have been originally granted."

24 & 25 Vict. c. 134, s. 230, after repealing the acts and parts of acts enumerated in Schedule (G), inter alia 12 & 13 Vict. c. 106, ss. 255—259: "But such repeal shall not affect any proceeding pending, or any right that has arisen, or may arise, or any penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of this act, under or by virtue of any acts or parts of acts repealed."

(1) 26 L. J. (Bank.) 90.

(2) 31 L. J. (M. C.) 105; L. & C. 131.

fault was an act which was made felony, and to which punishment is attached; but the liability to be arrested under a ca. sa. is not a "penalty."

[LUSH, J. The 12 & 13 Vict. c. 106, in ss. 256, 259, terms the acts for which this liability is incurred "offences," and, by s. 257, makes the arrest a mode of punishment.]

As to the other points, the affidavits are contradictory as to the payment and security, and a man ought not to be arrested and kept in custody in a doubtful case. It must be admitted that the plaintiff appears to have been properly appointed; but it does not appear that the ca. sa. was issued with his sanction; on the contrary, in his affidavit he obviously avoids saying this.

BLACKBURN, J. The only real question is, whether, as the sections of the act of 1849, under which this power to arrest a bankrupt was given, are sections which are repealed by the act of 1861, the case comes within the provision of the repealing section 230, by which pending proceedings and rights and penalties under the repealed sections are preserved. This may not be a pending proceeding; but I think there is both a "right" and a "penalty" within the meaning of the proviso. The bankrupt having been refused protection owing to his not having satisfactorily passed his examination, a certificate was granted under s. 257, under which the assignees might issue a ca. sa., and the bankrupt might be arrested. That looks very like a right that had arisen and a penalty that had been incurred. In *Reg.* v. *Smith* (1), it was held that the liability to be indicted for an act which was made a felony by the act of 1849, but had ceased to be so by virtue of the act of 1861, was a penalty which was preserved by s. 230. So here the penalty of being liable to be taken under a ca. sa. is preserved, and the right in the assignees to issue process and apprehend the bankrupt. The scheme of the new act was that in future, in new bankruptcies, these rights and penalties should not exist, but that the consequences of what had been done in bankruptcies before the statute passed should be preserved.

As to the other points attempted to be raised: the present official assignee was legally appointed before the writ was issued;

(1) 31 L. J. (M. C.) 105; L. & C. 131.

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and he alone was the assignee for the time being. Then it is said the ca. sa. was issued without his sanction: it is quite clear, from the fact of his making an affidavit in order to resist the defendant's discharge, that he at least ratified the arrest; and I can see no reason why a ratification, in this like other cases, is not sufficient. As to the allegation that the bankrupt has paid the creditors in full, that is distinctly contradicted; and at all events that is matter for the Court of Bankruptcy, not for this Court; so as to the seizure of property by the assignee, if the bankrupt has property, and the assignee obtains it, sufficient to pay twenty shillings in the pound, the bankrupt can get his discharge, or a certificate of conformity, from the Court of Bankruptcy.

MELLOR, J. I am of the same opinion. Where, under 12 & 13 Vict. c. 106, s. 257, a certificate has been granted, it is quite clear the assignees are entitled to issue execution against the bankrupt, and that is a "right;" and protection being refused, there is something added in the nature of a "penalty." It is a very reasonable enactment that the repeal of the parts of former statutes should not deprive the creditors or assignees of their rights against defaulting bankrupts, or release such a bankrupt from the consequences of his default. There is, therefore, abundantly sufficient ground for us to refuse to discharge the defendant. The case of *Reg.* v. *Smith* (1) is an à fortiori case, for there the liability to be indicted for an act as a felony, which had been reduced to a misdemeanor by the recent statute, was held to be preserved.

SHEE, J., concurred.

LUSH, J. Here both a right has arisen in the assignees and a penalty been incurred by the bankrupt in respect of a matter existing prior to the act of 1861, by virtue of the part of the act of 1849 which has been repealed.

As to the title of the present official assignee, the act of 1861 did not repeal the whole of the act of 1849, it only repealed certain clauses of the earlier act, and those sections still remain in force which enable the Court to appoint an official assignee in lieu of a former one deceased or resigned, and enable the assignee for the time

(1) 31 L. J. (M. C.) 105; L. & C. 131; 9 Jur. N. S. 199

being to act alone. The title, therefore, in the assignee is complete.

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Rule discharged.

Attorneys for plaintiff: *Murray & Hutchins.*
Attorneys for defendant: *Ley & Brocklesby.*

SKINNER, APPELLANT; KITCH, RESPONDENT.

May 14.

Master and Servant—Threats to Master, under 6 *Geo.* 4, *c.* 129, *s.* 3, *to force him "to limit the Description of his Workmen."*

The respondent, a master builder, had in his employ several carpenters who were members of a carpenters' union, and also one, J. J., who was not a member. The appellant, who was secretary to a branch lodge, served the respondent with the following notice in the middle of a week:—"I am requested by the committee of carpenters to give the men in your employ notice to come out on strike against J. J., unless he become a member of the society. This notice will be carried out after the end of this week, unless settled in accordance with the society's laws:"—

Held, that the appellant was rightly convicted, under 6 Geo. 4, c. 129, s. 3, of having by threats endeavoured to force the respondent "to limit the *description* of his workmen."

CASE stated by justices of Bridgwater under 20 & 21 Vict. c. 43.

On information preferred by the respondent against the appellant, under 6 Geo. 4, c. 129, s. 3, charging that the appellant, on the 22nd of October, 1866, at &c., did unlawfully by threats endeavour to force the respondent, who was then and there carrying on his business as a builder, to limit the description of his workmen, the appellant was convicted and sentenced to one month's imprisonment.

At the hearing of the information it was proved, on the part of the respondent, that he was a builder residing in Bridgwater. On the 22nd of October, 1866, he had a man named James Jordan, a carpenter and joiner, in his employ, who had been with him for six years. He also had in his employ five other men as carpenters and joiners, named respectively Moore, Lutley, Oaten, Watling, and Brugg, who were all members of the General Union of Carpenters and Joiners. Jordan was not a member of the union. On the 22nd of October the appellant called at the respondent's house,

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and gave him personally the following written notice in an envelope:—

"Fryern Street, Bridgwater.

Mr. William Kitch,

Sir,—I am requested by the committee of carpenters and joiners to give the men in your employ notice to come out on strike against James Jordan, unless he become a member of the above society: not being any way disrespectful to you or him, but being compelled by the union and laws.

This notice will be carried out after the 27th instant unless settled in accordance with the society's laws.

I remain, yours most respectfully,

Thomas Skinner, Secretary."

On the 23rd of October, Moore, Watling, and Lutley called on the respondent, and produced a notice they had received in the same handwriting as that of the notice respondent had received from the appellant, and purporting to bear his signature. There was no direct proof that either of these notices was in the handwriting of the appellant. The respondent's week ends on a Friday, when he pays his workmen. The Friday following the receipt of of the notice fell on the 26th of October. On that day Moore, Watling, and Brugg were at the respondent's house to be paid their wages. A conversation took place relative to the notice. The men left, and came again next morning. The respondent had another conversation with them, and they picked up their tools and left work. It was not at the respondent's wish that they left. Oaten was working at Wedmore that week. He returned on Saturday, the 27th of October, and the respondent saw him on the Monday morning, and had a conversation with him. He ceased working for the day; but ceased being a member of the society, and he is now working for the respondent. Up to the time that the respondent received the notice from the appellant he had heard nothing respecting Jordan from any other person. It was also proved that the appellant was the secretary of a local lodge or society, and that he caused to be printed the following notice:—

"Notice.—Men are requested not to go to Mr. Kitch's shop to look for work, as there is a strike there."

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That notice came into the hands of the respondent on the 27th of October; and it was also proved that the appellant caused the following document to be printed and circulated:—

"To the Members of General Union.

We, the members of the Bridgwater lodge do, under very pressing circumstances, appeal to the union for assistance to battle a magisterial action which has been entered against us by Kitch & Son, builders, of this town. The cause of which is as follows: Five of our members have for some time past been working for Messrs. Kitch, there also being a non-society man there, who was the sole cause of the forming of our lodge, the men's object being to get him to join us. They expressed their opinion to the committee that they could not work with him any longer unless he became a member. They came out against him. Kitch being determined to stand by the non-society man, has entered an action against us, and has been to the rest of the employers to induce them not to employ those men who had left him, and instituting every possible means to monopolize and obstruct our lodge and interest.

Trusting to the assistance of our fellow members for a little support, having no claim for this case on the funds of the union, and the prosecution taking place next week, we hope to have an early and favourable answer.

Signed on behalf of the Bridgwater Lodge,

Thomas Skinner, Secretary,

Fryern Street, Bridgwater,

to whom please address all communications."

The appellant, by his attorney, contended, first, that there was no evidence that the notice handed by him to the respondent was in his handwriting, or that he was aware of its nature or contents; and secondly, that it did not amount to a threat within the meaning of the statute, on the ground that a fair and reasonable alternative had been given to the master by his (weekly) servants to quit at the end of their week, in the alternative, namely, if Jordan did not join the association. (1) The justices, however, being satisfied

(1) With reference, probably, to the judgment of Cockburn, C.J., in *Walsby* v. *Anley*, 30 L. J. (M.C.) at p. 122; 3 E. & E. at p. 522.

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that the appellant did perfectly well know the nature and contents of the notice at the time he handed it to the respondent, and being also of opinion that such notice was intended to operate as a threat to the respondent, that, if he did not dismiss Jordan, or induce him to join the society, all other workmen who were society men would leave him, to his great inconvenience, convicted the appellant as above stated.

The question of law arising on the above statement, therefore, is whether the threat of the appellant that the respondent should lose the services of nearly all his workmen unless he dismissed from his employ the non-society man, or induce him to join the society, was a threat within the meaning of the 3rd section of the statute. (1)

(1) 6 Geo. 4, c. 129, s. 3: "If any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent or endeavour to prevent any journeyman, manufacturer, workman, or other person not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute, to any common fund, or to pay any fine or penalty, or on account of his not having complied, or of his refusing to comply, with any rules, orders, resolutions, or regulations made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force, any manufacturer or person carrying on any trade or business to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, *or to limit* the number of apprentices, or *the number or description of his journeymen, workmen, or servants;* every person so offending, or aiding, abetting, or assisting therein, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour for any time not exceeding three calendar months."

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H. T. Cole, Q.C., appeared for the respondent: but the Court, referring to *Walsby* v. *Anley* (1), called upon

J. D. Coleridge, Q.C., for the appellant. The offence of which the appellant was convicted is not the offence of endeavouring to force the workman to join a club, which is clearly an offence under the early part of s. 3 of 6 Geo. 4, c. 129, but of endeavouring to force the master to limit the "description of his workmen." This part of the section refers to the internal management of the business; and "description" of workmen has reference to the class, as to skill, &c. as in this particular trade of a builder, so many labourers or hodmen to so many bricklayers; or as in hardware factories, so many grinders, so many polishers, &c.

[LUSH, J. Surely the enactment was meant to point at this very class of case, to obviate any dictation as to the employment of club or non-club men.

BLACKBURN, J. The preamble of the statute goes to shew that. "Description" of workmen, I think, would include the class of workmen as to skill or departments of work, but why is it to be confined to that? The earlier part of the section is intended to protect the workmen against being intimidated into joining a club, and the latter part is correlative as to protecting the masters from coercion as to whom they will employ.]

One part of the section ought not to be used to interpret another part. Had the legislature intended to point at this, they might easily have made it an offence in express terms to endeavour to coerce a master into employing none but members of a club; but the language used is very far from pointing at this.

[LUSH, J. May not a workman be well *described* as a "union" or "non-union man"?

SHEE, J. If the matter were new, "description" might possibly be held to apply only to the quality, skill, or length of employment of the workmen in a particular department of the business; but the case of *Walsby* v. *Anley* (1) is directly against that view.]

That case, and *Shelbourne* v. *Oliver* (2), which was decided solely

(1) 30 L. J. (M. C.) 121; 3 E. & E. 516, 7 Jur. N.S. 465
(2) 13 L. T. (N. S.) 630.

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on the authority of that case, are no doubt against the appellant; but this point was not made in either case.

BLACKBURN, J. I think there cannot be the slightest doubt that the appellant was rightly convicted. After reciting that certain enactments for protecting the free employment of capital and labour, and for punishing combinations interfering with such freedom by violence, threats, or intimidation, had been ineffectual, and that it was expedient to make further provision, as well for the security and personal freedom of individual workmen in the disposal of their skill and labour, as for the security of the property and persons of the masters and employers, the statute proceeds, by s. 3, to make enactments, all of which, in the first part of the section, are directed to the protection of workmen, and amongst other things to protect them from being coerced into joining clubs; and the latter part of the section is directed to the correlative protection of the masters, and it uses language which is quite wide enough to make it an offence to force a master to employ none but a certain description of workmen, viz. members of a particular club. The principal object of the statute was to protect both masters and workmen from all dictation as to whom they will employ or serve; and a greater piece of tyranny cannot well be conceived than to force the respondent, by the threat of striking, to consent to punish Jordan, by discharging him, unless he will join the union, nor a more proper case for a conviction. I do not want any authority for my opinion; but the question, in effect, has been decided already by the cases of *Walsby* v. *Anley* (1), and *Shelbourne* v. *Oliver* (2), in both of which the endeavour was to prevent the employment of men who were obnoxious to the union simply for not conforming to their rules.

SHEE, J. The words of the section might have been larger, or more explicit, but the cases already decided must govern this case.

LUSH, J. Without the authority of any decided case, I should not have had the least hesitation in coming to the conclusion that

(1) 30 L. J. (M.C.) 121; 3 E. & E. 516. (2) 13 L. T. (N.S.) 630.

7 Jur. N.S. 465.

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the present was *the* case precisely intended to be pointed at and prevented by this statute. It repeals all former statutes against combinations, and proceeds to enact what combinations, with what objects, carried out by threats and intimidation, shall be illegal; and I cannot conceive that the legislature could have used more apt words to designate what they meant to prevent, than by saying it shall be unlawful by intimidation to force a master to limit the description of his workmen, when they meant to prevent the unlawful combining of a union of workmen for the purpose of coercing an employer to employ only the members of their club.

Conviction affirmed.

Attorneys for appellant: *Childs & Batten.*
Attorney for respondent: *H. A. Reed.*

HANNANT, APPELLANT; FOULGER, RESPONDENT.

May 14.

Licensed Victualler—Metropolitan Police, and other Districts—Licences necessary to sell Exciseable Liquors off Licensed Premises—25 Vict. c. 22, s. 13; 26 & 27 Vict. c. 33, s. 20; 27 & 28 Vict. c. 64, ss. 5, 7.

A licensed victualler, who has obtained an occasional licence from the excise, with the consent of a justice of the peace, under 25 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20, to sell exciseable liquors on the occasion of a public ball on unlicensed premises, must also, within the metropolitan police district, or other limits to which the 27 & 28 Vict. c. 64 shall have been applied, obtain the licence of the local authority under ss. 5 and 7 of the last act, in order to sell between the hours of one and four A.M.

CASE stated by one of the Metropolitan police magistrates under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, a superintendent of police, against the respondent, under s. 5 of the 27 & 28 Vict. c. 64, charging that the respondent, being a licensed victualler, did, at a certain public ball holden on the 14th of December, 1866, at the Hanover Square Rooms, within the Metropolitan police district, expose for sale and sell exciseable liquors between the hours of one and four A.M., contrary to the provisions of the statute.

At the hearing the following facts were proved: The respondent

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is a licensed victualler, carrying on his business at New Quebec Street, within the Metropolitan police district. On the occasion of a public ball which was to be holden at the Hanover Square Rooms, within the district, on the night and morning of the 13th and 14th of December, 1866, he applied for and duly obtained from the excise authorities, with the consent of a justice of the peace, an occasional licence under 25 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20. Under this occasional licence and consent he was authorized to sell exciseable liquors during certain hours specified, which included the hours between one and four A.M. on the morning of the 14th of December, 1866, at the public ball at the Hanover Square Rooms. The respondent being under the belief that an occasional licence from the chief commissioner of the Metropolitan police was also necessary, under s. 7 of 27 & 28 Vict. c. 64, applied to the said chief commissioner for the occasional licence, but the commissioner refused it. The respondent, however, disregarding this refusal, exposed for sale and sold between the hours of one and four A.M. certain exciseable liquors at the aforesaid ball. The Hanover Square Rooms are not a public house or refreshment house within the meaning of the 27 & 28 Vict. c. 64.

The magistrate dismissed the information, giving the following as the grounds of his decision: "The grounds of my decision were, mainly, that I held that the 27 & 28 Vict. c. 64, described statutably as the Public Houses Closing Act, was really a bill for the closing of public and refreshment houses, and that the provisions were not applicable to acts done by licensed victuallers out of public houses. The preamble of the act states that it is expedient to amend the law relating to the closing of public houses and refreshment houses within the Metropolitan police district, and then the 5th section prohibits licensed victuallers from selling exciseable liquors and other articles between the hours of one and four A.M. in any house, room, garden, or other place. I considered that the words applied to public houses and refreshment houses only, or to what might be taken upon a reasonable construction as their appurtenances. Furthermore, although the 26 & 27 Vict. c. 33, and the Public Houses Closing Act, were passed in consecutive sessions of parliament, I do not find in the later act any words repealing the provisions of the former act. I inferred that it was the intention

of the legislature that the earlier arrangement for allowing licensed victuallers to supply exciseable liquors at a public ball was to hold good. I considered this the more, inasmuch as a perfect machinery against abuse was provided by the earlier act. Furthermore, I thought that an occasional licence from the chief commissioner of police would not suffice to keep a licensed victualler clear from danger of the law unless he had obtained the occasional licence from the excise, and the consent of the justice of the peace, contemplated in the earlier acts; and, therefore, that the provisions of the earlier acts were not repealed. Finally, I considered that the offence specified in the summons was in nowise the mischief against which the Public Houses Closing Act was directed."

The question for the opinion of the Court was (inter alia), whether the occasional licence of the chief commissioner of police within the Metropolitan police district under the Public Houses Closing Act, 27 & 28 Vict. c. 64, is necessary to a licensed victualler, who has obtained the occasional licence from the excise, with consent of a justice of the peace (under 25 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20), in order to enable him lawfully to supply exciseable liquors between one and four A.M. at a public ball on premises, not his own, and not being a public house or refreshment house. (1)

(1) 25 Vict. c. 22, s. 13: "It shall be lawful for the Commisssioners of Inland Revenue, whenever they shall consider it conducive to public convenience, comfort, and order, and with the consents in writing of two justices of the peace usually acting at the petty sessions for the petty sessional division within which the place of sale is situate, to authorize any officer of excise to grant to any person who shall be duly authorized to keep a common inn, alehouse, or victualling-house, and who shall have taken out the proper excise licences to sell therein beer, spirits, wine, or tobacco, an occasional licence under this act empowering him to sell the like articles for which he shall have taken out such licences as aforesaid at any such other place, and for and during such space or period of time, not exceeding three consecutive days at any one time, as the said commissioners shall approve, and as shall be specified in such occasional licence; and any person who shall have taken out such occasional licence shall not be liable to any penalty or forfeiture whatever by reason or on account of his selling the articles mentioned in the said licence during the time and at the place specified therein; provided that no such occasional licence shall authorize the sale of any beer, spirits, or wine, except during the hours after sunrise, and before sunset."

26 & 27 Vict. c. 33, s. 20, enacts, 1. That the consent of one justice only shall be necessary. 2. The licence shall extend from sunrise to one hour

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F. M. White, for the appellant. The magistrate was wrong, and ought to have convicted the respondent. The 25 Vict. c. 22, s. 13,

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after sunset. 3. "Upon the occasion of any public dinner or ball, it shall be lawful for the person who shall have obtained an occasional licence to sell the said liquors during such hours before or after sunrise or sunset, as shall be allowed and specified in that behalf in the consent to be given by the justice of the peace for the granting of such occasional licence."

27 & 28 Vict. c. 64: "An act for further regulating the closing of public-houses within the Metropolitan police district, the City of London, certain corporate boroughs and other places," recites that "it is expedient to amend the law relating to the closing of public houses and refreshment houses within the Metropolitan police district, the City of London, certain corporate boroughs, and other places."

s. 1: "This act may be cited for all purposes as the 'Public Houses Closing Act, 1864.'"

s. 2: "This act shall be in force only within the limits of the Metropolitan police district, the City of London and the liberties thereof, and such corporate boroughs and districts of improvement commissioners as adopt the same in pursuance of the powers hereinafter given."

s. 5: "Save as hereinafter mentioned, no licensed victualler within the limits of this act shall sell, or expose for sale, or open, or keep open, any house, room, garden, or other place for the sale or consumption of exciseable liquors, or any article whatsoever, between the hours of one and four o'clock in the morning.

"No person within the limits of this act, shall open, or keep open, any refreshment house, or sell, or expose for sale or consumption in any refreshment house any refreshments, or any article whatsoever between the above-mentioned hours.

"Any person acting in contravention of this section, shall be liable to a penalty not exceeding 5*l*., to be recovered in a summary manner as provided by the 11 & 12 Vict. c. 43."

s. 7: "If any licensed victualler or keeper of a refreshment house, as aforesaid, within the limits of this act, applies to the local authority hereinafter mentioned for a licence exempting him from the provisions of this act on any special occasion or occasions, it shall be lawful for the local authority, if in its descretion it thinks fit so to do, to grant to the applicant an occasional licence exempting him from the provisions of this act during certain hours, and on a special occasion or occasions, to be specified in the licence; and no licensed victualler, or keeper of a refreshment house, to whom an occasional licence has been granted under this act, shall be subject to any penalty for a contravention of this act during the time to which his occasional licence extends, but he shall not be exempted by such occasional licence from any penalty to which he may be subject under any other act of parliament."

s. 8: "The following persons and bodies of persons shall be deemed to be local authorities capable of granting occasional licences for the purposes of this act:—

(1) "In the Metropolitan police district, the commissioner of police for the Metropolis, subject to the approbation of one of her Majesty's principal Secretaries of State."

The rest of the section is repealed by 28 & 29 Vict. c. 77, s. 5, and two justices are substituted as the local authority.

extended by 26 & 27 Vict. c. 33, s. 20, enables a licensed victualler to obtain an occasional licence from the excise, with the consent of a justice of the peace, to sell exciseable liquors at a place other than his licensed premises, from sunrise to one hour after sunset, and on the occasion of a public ball or dinner during any hours to be specified in the licence; and this is the general law; but by 27 & 28 Vict. c. 64, special regulations were introduced for the Metropolitan police and other districts, and within those districts, by s. 5, a licensed victualler, in order to be able to sell exciseable liquors anywhere between one and four A.M., must obtain the licence of the local authority. It is true, as the magistrate states in the grounds of his decision, that the title and preamble of the statute are confined to the closing of public houses, &c.; but the object was to prevent the sale of exciseable liquors in any place within the prohibited hours, and the wording of s. 5 clearly extends to the keeping open of any house, not merely the licensed house.

The Court then called upon

J. Brown, Q.C., for the respondent. The grounds which the magistrate gives for his dismissal of the summons are valid. The enactments of the first two statutes relate not merely to the excise, but were also for regulating the sale of exciseable liquors. The last act only relates to public houses and refreshment rooms, and not to the sale of liquors elsewhere; and s. 5 must be interpreted with this view, and "house," &c., in the section must mean the licensed house and its adjuncts.

[BLACKBURN, J. Why, then, is the language shifted in the second clause, so as clearly only to relate to sale *in* a refreshment house? The true reason would seem to be, that before the statute a licensed victualler could obtain an occasional licence to sell elsewhere than on the licensed premises, whereas, under 23 Vict. c. 27, the keeper of a refreshment house could not.]

Surely it is not to be said that the licensed victualler must get two licences.

[LUSH, J. The last clause of s. 7, which only exempts from liability under this act, clearly tends to that result. In truth, one is chiefly an enactment as to the excise, the other a mere police regulation, as was decided under similar acts in *Ash* v. *Lynn*. (1)]

(1) Law Rep. 1 Q. B. 270, 12 Jur. N.S. 485.

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In the present case, under the earlier statutes, the respondent has not only an excise licence, but the authority of a justice of the peace. Moreover, the later act, 28 & 29 Vict. c. 77, s. 5, withdraws the matter from the police altogether.

BLACKBURN, J. There can be no doubt, I think, upon the construction of this statute, 27 & 28 Vict. c. 64, s. 5. Before the act a licensed victualler had to obtain a licence to sell exciseable liquors in his house, and the keeper of a refreshment house had also to obtain a licence; then came the statutes 25 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20, by which a licensed victualler was enabled to obtain, with the consent of a justice, an occasional excise licence to sell exciseable liquors on certain given occasions out of his house at any hours; so that a licensed victualler could sell exciseable liquors out of his house, but the keeper of a refreshment house could only sell on his premises. The legislature, then, having, as we may well presume, this distinction before them, enact as follows: "Save as hereinafter mentioned, no licensed victualler within the limits of this act shall sell or expose for sale, or open, or keep open any house, room, garden, or other place, for the sale or consumption of exciseable liquors, or any article, between the hours of one and four o'clock in the morning." And then they further enact: "No person within the limits of this act shall open, or keep open, any refreshment house, or sell or expose for sale *in* any refreshment house, any refreshment or any article whatsoever between the above-mentioned hours." It seems to me, therefore, that it is impossible, without extreme straining of the language used, and when the legislature seem to have changed the wording on purpose, not to hold that the legislature have forbidden a licensed victualler, within the given limits, to sell exciseable liquors *anywhere* during the hours specified, unless he also obtains the licence of the local authority under s. 7. And that this is a cumulative enactment, is shewn by the end of s. 7, which enacts that if the licence of the local authority be obtained, the licensed victualler shall not be subject to any penalty under *this* act, but he shall not be exempted by such occasional licence from any penalty to which he may be subject by any other act. In fact, it appears clear that, wherever the last statute is in

operation, the licensed victualler must have the occasional licence both of the excise and of the local authority, in order to sell exciseable liquors anywhere within those limits during the prohibited hours. I may add, that it would probably be to defeat the very object of the last act, which would appear to be to prevent the sale of exciseable liquors anywhere late at night, to hold that the enactment of s. 5 is confined to the sale in the licensed house and premises.

SHEE, J. I am of the same opinion. The object of the 27 & 28 Vict. c. 64, which appears in the preamble, would in effect be defeated by confining the first clause of s. 5 in the manner contended for by the respondent's counsel; the intention was to prevent the sale of exciseable liquors *anywhere* within the prohibited hours without the licence of the local authority; and this construction makes the reason for the different wording in the second clause intelligible; and that this was only a matter of police regulation, without any reference to the excise, is made clear by the last clause of s. 7, which leaves the person who has obtained what may be called the police licence, still liable to any penalties that he may incur under any other act, such as excise acts.

LUSH, J. I am of the same opinion. We cannot read the first clause of s. 5 of 27 & 28 Vict. c. 64, in the sense contended for on behalf of the respondent without interpolating a word which I think was intentionally omitted. The first clause forbids any licensed victualler to sell, or expose for sale, any exciseable liquor, or open, or keep open, any house, &c.; the second clause forbids any person to sell, or expose for sale *in* any refreshment house, confining it to the only place where a keeper of a refreshment house could sell, viz. the refreshment house; but in order to confine the first clause in the same way, we should have to interpolate the word "in." When, therefore, I find the word "in" used in one clause, but not in the other, I am led irresistibly to the conclusion that the first clause was intended to prohibit a licensed victualler from selling anywhere within the given district during the specified hours without the licence of the local authority.

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So far from there being any repugnance between this and the former enactments requiring an excise licence for the same purpose, the intention appears to me to have been to make the last a cumulative provision as a matter of police regulation. A licensed victualler, under the former statutes, might obtain an excise licence, backed by the authority of a justice, to sell on certain days, at a public ball or dinner at some other place than his licensed premises, during any hours to be specified in the licence; but then comes the later statute and says, in the given districts, in addition to this, in order to sell within the particular hours of one to four A.M., you must also obtain the licence of the local authority. Not only is this the natural construction of s. 5, but it also seems to me a very reasonable provision.'

Case remitted accordingly.

Attorneys for appellant: *Ellis & Ellis.*
Attorney for respondent: *E. T. Lewis.*

May 10.

CLAUDET *v.* PRINCE.

Practice—Notice of Trial—Postponement of Trial by Judge's Order.

When the trial of a cause for which due notice of trial has been given is postponed from one sittings in London to the following sittings by a judge's order obtained by the defendant, it is not necessary for the plaintiff to give a fresh notice of trial.

THIS was a rule calling on the plaintiff to shew cause why the verdict obtained in this action should not be set aside and a new trial had on the ground of irregularity, the plaintiff having proceeded to trial without giving fresh notice of trial to the defendant after the cause had been postponed by a judge's order, and why the plaintiff should not pay the costs of this application.

The following facts appeared from the affidavits:

On the 26th of March, 1866, due notice of trial was given by the plaintiff for the then ensuing sittings in London after Easter

Term. On the 5th of May the defendant obtained a rule for a special jury, the effect of which was to delay the trial until the sittings after Trinity Term.

The 9th of July was appointed for the trial, and on the 7th, which was a Saturday, the defendant gave the plaintiff notice that he abandoned the rule for a special jury. This, however, caused no delay, as the special jury had also been summoned on behalf of the plaintiff. The cause was in the paper on the 9th and 10th of July, but was not reached, and, therefore, was made a remanet, and would, in the ordinary course, have come on for trial at the sittings after Michaelmas Term. On the 7th of December, before the sittings, the defendant took out a summons to postpone the trial until the sittings after Hilary Term, 1867, on the ground of the absence of a material witness. On the 10th, the associate gave notice of the appointment of the 14th for the trial of the cause. On the 12th, an order was made by Mellor, J., in accordance with the terms of the defendant's summons, and the cause was accordingly made a remanet.

No fresh notice of trial was given by the plaintiff; and on the 11th of the following February the associate appointed the 18th for the trial. On the 12th, the defendant's attorney wrote to the plaintiff's attorney, stating that he should not attend at the trial, as no fresh notice had been given.

On the 18th of February, the cause was tried in the defendant's absence, and a verdict was found for the plaintiff for 537*l.*

There was no affidavit of merits on the part of the defendant.

A. Wills (*J. Brown, Q.C.*, with him), shewed cause. (1) It must be admitted at the outset that there are several cases which may be considered authorities against the plaintiff; but these, however, with one exception, are very old cases. On a question like this there can be no inflexible rules of law; it is a mere matter of practice. During the last century there may well have been changes in practice. On principle, it would seem that it ought not to be necessary to give a fresh notice after a postponement of a trial to a fixed time by a judge's order obtained at the

(1) In the Bail Court, before Mellor and Lush, JJ.

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instance of the defendant. No such notice would have been necessary if the cause had been made a remanet by operation of law in consequence of not having been reached at the sittings after Michaelmas Term, or if the trial had been postponed by an order at nisi prius: *Shepherd* v. *Butler* (1): or if the trial had been stayed by injunction, which was afterwards dissolved: *Stockton and Darlington Railway Company* v. *Fox*. (2) It is difficult to see any distinction between these and the present case. The only recent case which is in the defendant's favour is *Cawley* v. *Knowles* (3); but it is not very easy to understand that case; moreover, the report in the Common Bench Reports differs from that in the New Reports. Even if it would have been more regular to have given fresh notice of trial, still the granting of a new trial is a matter for the discretion of the Court; and in this case there is no sufficient reason shewn for the exercise of that discretion in the defendant's favour. The defendant knew to what date the trial was postponed, because he himself obtained the order. The trial was put off by the defendant from time to time, without any other object than that of delay. And it is to be observed also that there is no affidavit of merits on the part of the defendant.

Kenealy, in support of the rule. This is not a question to be decided by principle, but is governed by authority. Where a trial is put off by a rule of court, a fresh notice of trial is necessary, notwithstanding a special day is fixed by the rule: *Ellis* v. *Trusler* (4): or the plaintiff gives a peremptory undertaking to try at the next sittings: *Jacks* v. *Mayer*. (5) The late case of *Cawley* v. *Knowles* (3) is entirely in the defendant's favour. This view is also adopted in Lush's Practice, vol. i. p. 492, 3rd ed. These authorities shew that the defendant was entitled to a notice of trial, and therefore was entitled to treat any trial without such notice as irregular. If the trial was irregular, the defendant is entitled to a new trial, and it is not a question for the discretion of the Court. Whatever may be the decision of the Court, it is clear that by the old practice a fresh notice would have been necessary; and it would, therefore, be a great hardship

(1) 1 D. & R. 15.
(2) 2 L. M. & P. 141; 6 Ex. 127
(3) 16 C. B. (N.S.) 107; 3 N. R. 477.
(4) 2 W. Bl. 798.
(5) 8 T. R. 245.

upon the defendant if the rule were discharged, as he was justified, upon the authority of decided cases, in considering the trial as irregular.

Cur. adv. vult.

Later in the day the judgment of the Court (Mellor and Lush, JJ.) was delivered by

MELLOR, J. This is purely a question of the practice of the Court, and does not involve the consideration of any principle of law. We have consulted with the other judges of this Court, and we all think that where a judge's order has been made, on the application of the defendant, to postpone a trial upon the ground of the absence of a material witness for the defendant, and the cause has in consequence been entered as a remanet in the Associate's book, no fresh notice of trial is necessary. We are of opinion that the whole practice, as established by the cases cited in the argument for the defendant, has no principle to support it.

There is no good ground of distinction between an ordinary judge's order and one that has been made at nisi prius. In deciding thus, we do not conflict with the case of *Cawley* v. *Knowles* (1), as it seems that there the Court exercised their discretion, and did not grant the rule as a matter of right. The true rule is that which is laid down in *Stockton and Darlington Railway Company* v. *Fox* (2), where an action had been stayed by an injunction obtained by the defendant, which was afterwards dissolved. The Court in giving judgment in that case say, "The injunction was obtained for the benefit of the defendant; and when that was dissolved, all parties were in statu quo, and no further notice of trial was necessary than that which had been already given." We think that expresses the law very well; and the same rule is applicable to a case where a trial has been postponed by a judge's order. As, however, the defendant may have been misled by the authorities, especially by the rule laid down in Lush's Practice, we do not like to discharge the rule in this case. If, therefore, the defendant will bring into court, within ten days, the amount for which the verdict was given, this rule is to be made absolute. If the defendant does not comply with this condition,

(1) 16 C. B. (N.S.) 107; 3 N. R. 477. (2) 2 L. M. & P. 141; 6 Ex. 127.

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then the rule to be discharged without costs. If the rule is made absolute, the costs of the rule and of the last trial to abide the event of the new trial.

Rule absolute on the above terms; otherwise to be discharged.

Attorneys for plaintiff: *Cowdell & Grundy.*
Attorney for defendant: *Parkes.*

May 11.

MAYER, APPELLANT; HARDING, RESPONDENT.

Practice—Transmitting Case stated under 20 *&* 21 *Vict. c.* 43, *s.* 2, *within three Days—Computation of Time.*

The appellant having applied to justices to state a case under 20 & 21 Vict. c. 43, received the case from them on Good Friday, and transmitted it to the proper court on the following Wednesday:—

Held, that, as the offices of the Court were closed from Friday until Wednesday, the appellant had transmitted the case as soon as it was possible to do so, and, therefore, had sufficiently complied with the requirements of the 2nd section, which directs that the case shall be transmitted by the appellant within three days after he has received it.

THIS was a rule calling upon the appellant to shew cause why his appeal, on a case stated under 20 & 21 Vict. c. 43, should not be struck out of the Crown Paper, on the ground that the provisions of the 2nd section of that act had not been complied with. (1)

The appellant, being dissatisfied with the determination, by justices of the peace for Newcastle-under-Lyme, of a complaint made against him, applied to them to state and sign a case, under 20 & 21 Vict. c. 43, s. 2, for the opinion thereon of the Court of Queen's Bench.

The justices duly stated and signed a case, and sent it to the appellant, who received it on the 19th of April, being Good Friday. The appellant lodged the case in the Queen's Bench on the following Wednesday.

(1) 20 & 21 Vict. c. 43, s. 2, provides that either party to a proceeding before justices may, in certain cases, apply to such justices "to state and sign a case . . . . for the opinion thereon of one of the superior courts, to be named by the party applying; and such party . . . . shall, within three days after receiving such case, transmit the same to the court named in his applicatio

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Kenealy shewed cause. (1) The provisions of s. 2 of 20 & 21 Vict. c. 43, have been complied with, because the appellant transmitted the case as soon as it was possible to do so. As the offices of the Court of Queen's Bench were closed on Good Friday, and were not re-opened until Wednesday, the appellant could not have transmitted the case a day sooner. To hold that this was not a sufficient compliance with the section, would be to deprive the appellant altogether of his right of appeal. The section must be construed to mean three days when it is possible to lodge the case on at least one of those days. Other provisions of this section have been held to be sufficiently complied with when an appellant has done all it was in his power to do: *Syred* v. *Carruthers*. (2) The cases of *Morgan* v. *Edwards* (3), and *Woodhouse* v. *Woods* (4), are apparently against this contention, but in these decisions the learned judges carefully guard themselves from its being supposed that they decide that the provisions of this section are to be construed strictly as conditions precedent, where it has been impossible for the appellant to perform them. These cases are, therefore, really in favour of the appellant.

McMahon, in support of the rule. The transmitting of the case is a condition precedent which the parties themselves cannot waive: *Morgan* v. *Edwards*. (3) Without the performance of that condition this Court has no jurisdiction to hear the appeal: *Peacock* v. *The Queen*. (5) Sunday is included in the three days, although the appellant by that construction may have only two days from the time of receiving the case within which it can be transmitted to the Court: *Peacock* v. *The Queen* (5); *Pennell* v. *The Churchwardens of Uxbridge*. (6)

MELLOR, J. I am of opinion that the rule must be discharged. Where a statute requires a thing to be done within three days, or six months, or within any particular period, the time may no doubt be circumscribed by the fact of its being impossible to comply with the statute on the last day of the period so fixed.

(1) In the Bail Court, before Mellor and Shee, JJ.

(2) E. B. & E. 469; 27 L. J. (M.C.) 273.

(3) 5 H. & N. 415; 29 L. J. (M.C.) 108.

(4) 29 L. J. (M.C.) 149.

(5) 4 C. B. (N.S.) 264; 27 L. J. (C.P.) 224.

(6) 31 L. J. (M.C.) 92.

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But this is not the present case. Here it was impossible for the appellant to lodge his case within three days after he received it. As regards the conduct of the parties themselves, it is a condition precedent. But this term is sometimes used rather loosely. I think it cannot be considered strictly a condition precedent where it is impossible of performance in consequence of the offices of the court being closed, and there being no one to receive the case. The appellant lodged the case on Wednesday, that is, he did all that it was practicable for him to do. I think we should strain the statute, if we gave it the construction contended for by Mr. McMahon, which might be productive of very inconvenient results. This does not interfere with the principle that the parties themselves cannot extend the time by their own acts. Here all that was possible was done, and I think that is sufficient.

SHEE, J., concurred.

Rule discharged without costs.

Attorneys for appellant: *Lewis & Sons.*
Attorney for respondent: *N. J. Holt.*

May 15.

READHEAD *v.* THE MIDLAND RAILWAY COMPANY.

Carrier of Passengers—Measure of Obligation as to Roadworthiness of Carriage—Railway Company.

A carrier of passengers for hire is bound to use the utmost care and skill in everything that concerns the safety of the passengers; but he is not bound at his peril to provide a carriage roadworthy at the commencement of the journey; and if the carriage turns out to be defective, he is not liable to a passenger for the consequences, if the defect was of such a nature that it could neither be guarded against in the process of construction, nor discovered by subsequent examination: by Mellor and Lush, JJ.

But by Blackburn, J., there is an obligation on a carrier of passengers to provide at his peril a vehicle in fact reasonably sufficient for the journey, and he is responsible for the consequences of any insufficiency, though arising from a latent defect.

DECLARATION, that the defendants were carriers of passengers by railway from Nottingham to South Shields for reward; that the plaintiff became a passenger to be safely and securely carried

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by them as such carriers in a certain train for reward: that the defendants managed and conducted the train so carelessly, and took so little care in providing a proper and safe carriage, and were so careless and negligent in examining from time to time the wheels of the carriage in which the plaintiff was, that the carriage was broken to pieces and the plaintiff injured.

Plea, not guilty.

At the trial before Lush, J., at the Durham spring assizes, 1866, the evidence given for the plaintiff was, that he was a second-class passenger from Nottingham to South Shields, by an express train on the defendants' railway; he changed carriages at Trent, and after proceeding some distance, while the train was going at great speed, the carriage in which he was riding began to oscillate, then left the rails, and ultimately broke away from the first part of the train and turned over; the plaintiff was very seriously injured. It was also suggested that the train was not brought to a stand-still so soon as it ought; this, however, was conclusively negatived by the defendants' evidence. It was proved on the part of the defendants that the cause of the accident was the giving way of one of the wheels of the carriage in which the plaintiff was. The tire of the wheel had broken into three pieces owing to a flaw in the welding, caused by an air-bubble. Several witnesses were called, who stated that such a defect would sometimes occur in spite of the greatest care on the part of the manufacturer; that it could not be discovered in the process of manufacture nor afterwards, either by the eye or from the ringing of the metal. It was further proved that the carriage in question, which belonged to the London and North Western Company, being used by the defendants in the mutual arrangements of the two companies, had been examined at the usual places, amongst others at Trent, and that the wheel on hammering then rang true. The tire was of considerably more than the minimum thickness, to which it is found in practice safe to wear tires.

The learned judge told the jury that the material question was whether, upon the whole of the evidence, they were of opinion that the defendants were guilty of negligence. If the injury to the plaintiff was properly due to an accident, that is to say, if it could not reasonably be foreseen, and was not due to any fault or care-

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lessness on the part of the defendants, the plaintiff was not entitled to recover. The learned judge then pointed out that the evidence given on the part of the plaintiff did not substantiate the charge in the declaration, which he read to them. The evidence for the defendants shewed clearly that the accident was caused by the breaking of the tire of the wheel. The fact that the carriage did not belong to the defendants made no difference in their liability. Was there any evidence of negligence on the part of the defendants in not detecting the fault in the wheel? If, as the evidence went to shew, the defect in the wheel could not be detected either by the eye or the ear, then there was no negligence on the part of the defendants. The learned judge then went through the evidence as to the impossibility of always preventing such latent flaws in the manufacture, or of detecting them during the process, or by subsequent examination. The jury were to say on the whole evidence, whether they were satisfied that the injury to the plaintiff was due to the neglect of the defendants, or whether it was not one of those accidents to which all are subject, in which, though injuries arise, no one is chargeable in law for the consequences. If the jury found any fault on the part of the defendants as a breach of duty on their part, which the jury might think the defendants ought reasonably to have performed, then the verdict would be for the plaintiff.

The jury returned a verdict for the defendants.

A rule was obtained for a new trial on the ground of misdirection of the judge in telling the jury that the defendants were entitled to the verdict if the accident was caused by the latent defect in the tire of the wheel.

June 20, 1866. *Aspinall, Q.C.*, and *Kemplay*, shewed cause. The plaintiff, in order to shew that there has been misdirection, must contend that there is an implied warranty on the part of a carrier of passengers, that the carriage in which the passenger travels is roadworthy for the journey. There is no authority for such a proposition. *Bremner* v. *Williams* (1) will be cited by the other side, but the dictum of Best, C.J., that every coach proprietor warrants to the public that his stage-coach is equal to the journey

(1) 1 C. & P. 414, 416.

it undertakes, was not necessary to the decision of the case. *Sharp* v. *Grey* (1) will also be relied on: but there is a distinction between that case and the present; there, by unscrewing the iron clamps and taking off the wooden frame, the defect in the axletree might have been discovered; but here, by no examination whatever, could the defendants have discovered the defect in the tire of the wheel. And it is also to be observed that Tindal, C.J., in that case, directed the jury to consider whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely: so that that case was decided on the ground of negligence on the part of the carrier. The law on the subject, however, is correctly stated by Alderson, J., in his judgment: "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction as well as for such as may exist afterwards, and be discovered on investigation." The evidence here is, that it was impossible to discover the defect until the tire was actually broken. As pointed out by Sir James Mansfield in *Christie* v. *Griggs* (2), there is a distinction between a contract to carry goods and a contract to carry passengers; for the goods the carrier is answerable at all events. He does not warrant the safety of the passengers, but only that as far as human care and foresight will go, their safe conveyance will be provided for. He is not liable for the consequences of a pure accident. *Grote* v. *Chester and Holyhead Railway Company* (3) shews that if a competent person is employed to make the tire, and he uses due and reasonable care, and employs proper materials in the work, the railway company will not be liable for the defect in the tire, which it was impossible to detect, and so prevent the accident. There is a dictum of Cresswell, J., in *Benett* v. *Peninsular Steamboat Company* (4), which may be relied on by the plaintiff: viz. that *Sharp* v. *Grey* (5), lays down the law that a carrier is bound at all events to provide a sound coach. But the learned judge's observation had no direct bearing on the question then before the Court.

[BLACKBURN, J. It was held in *Brown* v. *Edgington* (6) that

(1) 9 Bing. 457.
(2) 2 Camp. at p. 81.
(3) 2 Ex. 251.
(4) 6 C. B. at p. 782.
(5) 9 Bing. 548.
(6) 2 M. & G. 279.

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there is an implied warranty that an article furnished by a manufacturer shall be fit and proper for the purpose for which it is supplied.]

Manisty, Q.C., and *T. Jones*, in support of the rule. The point is new, and the authorities bearing upon it have been already cited. It is clear that the ruling of Best, C.J., in *Bremner* v. *Williams* (1), and the case of *Sharp* v. *Grey* (2), are direct authorities that there is a warranty on the part of a coach owner that his coach is fit for the journey. It is a sound rule of law, because the passenger injured thus has his remedy against the company, and the company against the person who supplied the insufficient vehicle. By analogy to the case of the owner of a ship who warrants his ship seaworthy for the voyage, so a carrier of passengers warrants the vehicle roadworthy for the journey.

Cur. adv. vult.

May 15. The following judgments were delivered:

LUSH, J. This was an action, tried before me, for an injury caused by the breaking down and overturning of the carriage in which the plaintiff was travelling as a passenger on the defendants' railway. The accident arose from the fracture of one of the wheels of the carriage, the tire of which had split into three pieces, owing, as it was afterwards discovered, to a latent flaw in the welding; and it was proved, on the part of the defendants, that, at the commencement of the journey, the wheel was to all appearance strong and sound, that such a flaw in the welding may occur without any fault on the part of the manufacturer, that there were no means of detecting it beforehand, and that in fact the carriage had been examined, according to ordinary practice, before the train had started on the journey, and had answered to all the usual tests of soundness.

I directed the jury, that if they believed this evidence, the defendants were not responsible for the accident, and they accordingly found their verdict for the defendants.

A rule was granted for a new trial on the ground that a carrier of passengers is bound at his peril to provide a roadworthy

(1) 1 C. & P. 414. (2) 9 Bing. 457.

carriage, and is consequently liable, if the carriage turns out to be defective, notwithstanding that the infirmity was of such a nature that it could neither be guarded against nor discovered.

The question thus nakedly raised is one of vast importance at the present day, both to railway companies and passengers; and there being no case in our reports in which it has been argued and adjudicated, we took time to consider our judgment. Having done so, and given to the subject the best consideration in my power, I adhere to the opinion that the law imposes no such liability on railway companies, though, as my Brother Blackburn has come to a different conclusion, I express that opinion with some degree of diffidence.

It is not contended that the obligation of a carrier of passengers is co-extensive with that of a carrier of goods, who by the custom of the realm is placed in the position of an insurer, subject only to the exceptions of loss or damage by "the act of God, or the public enemies of the crown." The reasons upon which that liability is based, and which are expressed by Holt, C.J., in *Coggs* v. *Bernard* (1), and by Best, C.J., in *Riley* v. *Horne* (2), are inapplicable to a carrier of passengers. The latter has not the same control over persons which he has over goods, nor the same opportunities of abuse and misconduct, the apprehension of which gave rise to this rigorous rule of law; and therefore the law has never imposed upon him the responsibility of an insurer. The undertaking of a carrier of passengers, says Dr. Story, in his work on Bailments, s. 601, "is not an undertaking absolutely to carry safely," but only to exercise "due care and diligence in the performance of his duty." But it is contended that in this particular part of his duty, viz. the providing a suitable vehicle, his undertaking goes beyond the measure of "due care and diligence," and includes a warranty that the carriage which he provides is sound and free from all defects which render it unfit for the service, though he has used every means in his power to make it sound, and though he could not by any amount of care, skill, or vigilance have ascertained that it was not so. The language of Story just quoted does not suggest any such qualification, and surely so important an element in the contract about which he is

(1) 2 Lord Raym. 909, 918. (2) 5 Bing. 217, 220.

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treating, would have been noticed by that learned writer, if he had supposed it to exist. No such liability is, however, hinted at throughout the work, nor, as I am aware of, in any other text book. The proposition is one which I cannot adopt without authority; because I can see no reason why a carrier should be held to warrant more than due care and diligence can enable him to perform as respects the quality of his carriage, when it is admitted that he is under no such liability as respects the conduct or management of it.

We were pressed with what were alleged to be analogous cases of a shipowner, who is held to warrant the seaworthiness of his vessel; and of a manufacturer of goods ordered for a given purpose, who, it was contended, is held to warrant their fitness and sufficiency for that purpose. As to shipowners, I agree there is abundant authority for the doctrine laid down; and moreover, that there is no distinction in this respect between a carrier by water and a carrier by land. But it is to be observed, that wherever this particular liability of a shipowner is mentioned, it has reference to his obligation as the carrier of cargo. In that capacity he is an insurer of its safe delivery, subject only to the excepted perils. His warranty of seaworthiness in such a case springs out of, and necessarily results from, the absolute duty he has undertaken; and is not a warranty superadded to, and exceeding the terms and measure of his contract to carry, as it would be if it were extended to a carrier of passengers. A carrier of goods by land, may with equal propriety be said to warrant the roadworthiness of his carriage, because he warrants against every casualty by which the goods might be lost or damaged on the journey.

As regards the second case put, viz. that of the manufacturer who supplies goods to order for a given use or purpose, I do not stop to consider whether the analogy is so complete as the argument assumes it to be, because it does not appear to me that the case mainly relied on, viz. *Brown* v. *Edgington* (1), sanctions the doctrine which is sought to be deduced from it. Upon carefully examining the facts there, it will be found that no such question as that we have now to determine arose in the case. The insufficiency of the rope was attributable to causes which imply blame

(1) 2 M. & G. 279.

in the manufacturer, viz. to either a want of judgment, or a want of care, or skill, both, or all. The rope was not strong enough for the purpose for which it was known by the defendant to have been required, it having been made of too small a size, or of faulty materials, or been badly put together; and whatever the cause of its failure was, it was one which might have been prevented, and it was assumed by the Court, as it was assumed in the case of *Jones* v. *Bright* (1), that the manufacturer might, and therefore ought to, have made it sufficient for the purpose. The main contest in the case was, whether the defendant was liable, seeing that he was not the manufacturer of the rope, but had procured it from a ropemaker. The question of liability for a hidden, undiscoverable, and unavoidable defect, was not present to the mind of any of the judges who decided that case. I cannot, therefore, regard it as an authority to the extent necessary to sustain the plaintiff's argument, nor am I aware of any other case on that point which established such a position.

I do not feel it necessary to review in detail the cases which more directly bear upon the liability of a carrier of passengers. They are quoted by Story as the authorities for the rule which he lays down, and, in my judgment, they do not carry the liability further than he has stated it. In all of them, where it has become necessary to define that liability, the judges have carefully distinguished between a carrier of passengers and a carrier of goods, and have pointedly declared that the liability of the former stands on the ground of negligence alone: see *Aston* v. *Heaven* (2); *Christie* v. *Griggs* (3); *Crofts* v. *Waterhouse*. (4) Undoubtedly, there are expressions used in some of those cases which, if taken alone, and without reference to the particular facts, favour the argument of the plaintiff: see per Lord Ellenborough, in *Israel* v. *Clark* (5); Best, C.J., in *Bremner* v. *Williams* (6); and per Gaselee and Bosanquet, JJ., in *Sharp* v. *Grey*. (7) But reading such expressions as they should be read, in connection with, and as applicable to, the facts of each case, it is, to my mind, evident

(1) 5 Bing. 533.
(2) 2 Esp. 533.
(3) 2 Camp. 79.
(4) 3 Bing. at p. 321.
(5) 4 Esp. 259.
(6) 1 C. & P. at p. 416.
(7) 9 Bing. at p. 459.

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that the learned judges who used them did not intend them to be understood in the sense now imputed to them. The decisions in those cases in which such expressions are used, seem to me against the plaintiff rather than decisions in his favour. In *Sharp* v. *Grey* (1), the case most pressed in the argument by the plaintiff's counsel, as also in the case of *Christie* v. *Griggs* (2), the axletree had, without any external cause to account for it, suddenly snapped. If there was such a warranty as is now insisted on, that warranty had clearly been broken, for the coach had turned out to be not roadworthy. There was, therefore, nothing to go to the jury but the amount of damages; whereas, in each case, the question was left to the jury whether the defendant was liable as guilty of a want of due care or not. In *Sharp* v. *Grey* (1), the jury found a verdict for the plaintiff, which the Court refused to disturb; in *Christie* v. *Griggs* (2), they found for the defendant, and no motion appears to have been made to set this verdict aside. Coming down to a more recent period, I find the same doctrine laid down by the Lord Chief Justice of this court in *Stokes* v. *Eastern Counties Railway Company*. (3) That was a case exactly similar to the present. The wheel had broken from a latent flaw in the welding, and great injury had been done to several passengers. After a very lengthened trial, the jury found a verdict for the defendants, and although the plaintiff in that case, and many other persons, were deeply interested in questioning the ruling of the Lord Chief Justice, no attempt was made to set aside the verdict.

As far, therefore, as the authorities in this country go, they are against the position taken by the plaintiff, and considering that many such accidents have occurred since the introduction of railways, the fact that this is the first time so extensive a liability has been insisted on, argues a general impression against it. But though the question has not before been presented for solemn adjudication in this country, it has been raised more than once in the courts of the United States, and in every case the judgment has been in favour of the carrier. In *Ingalls* v. *Bills* (4), cited in the 7th edition of Story on Bailments, p. 565, the Court delivered

(1) 9 Bing. 457.
(2) 2 Camp. 79.
(3) 2 F. & F. 691.
(4) 9 Metcalf, 1.

an elaborate judgment, reviewing all the authorities, English and American, and affirming the doctrine that a carrier of passengers is liable only for negligence.

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For these reasons, I am of opinion that the rule must be discharged.

MELLOR, J. In this case the plaintiff, being a passenger on the line of defendants' railway, sustained an injury by the breaking of one of the wheel-tires of the carriage in which he was travelling, owing to a latent defect in its construction, not discoverable by the most careful examination.

My Brother Lush, who presided at the trial, in leaving the case to the jury, told them that a carrier of passengers for hire was bound to use the utmost care, skill, and diligence, in everything that concerned the safety of passengers; but that if the injury was due to a hidden defect in the carriage, which the utmost care and skill could not discover, the defendants were not responsible. I have come to the conclusion that such direction was right, and that the rule for a new trial must be discharged.

The propriety of that direction depends upon the nature and extent of the liability, which a carrier of passengers for hire undertakes with regard to each passenger.

The responsibility, both of common carriers of goods for hire, and of common carriers of passengers for hire, notwithstanding some important differences between them, rests for its foundation upon the general custom of the realm; in other words, upon the common law; and the liability of each class of carriers, where it is not affected by some special contract, arises from a duty implied by law, although the law will raise a contract as springing from that duty: *Bretherton* v. *Wood* (1); *Ansell* v. *Waterhouse*. (2) Until the time of *Dale* v. *Hall* (3), it seems to have been the usual mode to declare against common carriers either of goods or passengers, setting forth the custom of the realm, when it was supplanted by the modern mode of declaring either in case for breach of duty, or on the contract arising out of the duty so implied by law. In *Coggs* v. *Bernard* (4), Lord Holt, in defining his fifth

(1) 3 B. & B. 54. (2) 6 M. & S. 385. (3) 1 Wils. 281.
(4) 2 Lord Raym. at p. 918; 1 Sm. L. C. at p. 189, 6th ed.

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sort of bailment, says, first, "if it" (the delivery of goods) "be to a person of the first sort" (that is, one who exercises a public employment) "and he is to have a reward, he is bound to answer for the goods, at all events; and this is the case of the common carrier, common hoyman, master of a ship, &c. . . The law charges this person, thus entrusted to carry goods, against all events but acts of God and the enemies of the king. For though the force be never so great, as if an unreasonable number of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And *this is the reason the law is founded upon in that point.*" And in the case of *Riley* v. *Horne* (1), Chief Justice Best, in treating upon the same subject, said: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows, or sends any servant with them to the place of their destination. If they should be lost, or injured by the grossest negligence of the carrier, or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for reward, *namely, that of taking all reasonable care of it,* the responsibility of an *insurer.*" This judgment is cited with approbation by Mr. Justice Story (2), and, as far as I am aware, has been generally considered truly to express the reasons upon which the policy of the law with regard to common carriers of goods has been founded. The liability of a common carrier of goods, is therefore that of an insurer, arising out of the policy of the law, which superadds such a responsibility to that

(1) 5 Bing. at p. 220.

(2) Law of Bailments, s. 491.

springing merely out of a contract to carry for reward, viz. "*the taking all reasonable care of the goods delivered to be carried.*"

The policy of the law with regard to common carriers of goods for hire, and the reasons assigned for it by Lord Holt and Chief Justice Best, appear to have no application to the case of carriers of passengers for hire; and hence by one writer on the subject it has been stated that "a stage-coach owner, who carries passengers *only*, is not, properly speaking, a common carrier; he does not warrant the safety of the passengers at all events, but only that, so far as human care and foresight will go, their safe conveyance will be provided for." (1)

We have, however, seen that his liability, like that of the carrier of goods, arises out of the duty implied by law, and that the declaration may be either in case for the breach of such duty, or on the contract springing from it, as was said by Holroyd, J., in the case of *Ansell* v. *Waterhouse* (2): "It seems to me, therefore, that although the law will raise a contract with a common carrier to be answerable *for the careful conveyance of his passenger*, nevertheless, he may be charged in an action upon the case for a breach of his duty." Does then the law, in the case of a carrier of passengers for hire, superadd any liability beyond that of providing for "*the careful conveyance of his passengers?*"

In *Crofts* v. *Waterhouse* (3), which was an action against a stage-coach proprietor by a passenger injured by the overset of the coach, Best, C.J., said: "This action cannot be maintained, unless *negligence* be proved. . . . The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But, with all these things, and when everything has been done that human prudence can suggest for the security of the passengers, an accident may happen. . . . If,

(1) Smith's Mercantile Law, 7th ed. p. 282.
(2) 6 M. & S. at p. 393. (3) 3 Bing. 319, 321.

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having exerted proper skill and care, he, from accident, gets off the road, the proprietors are not answerable for what happens from his doing so." And Park, J., in the same case, said: "A carrier of goods is liable in all events, except the act of God or the king's enemies. A carrier of passengers *is only liable for negligence.*" So, in *Aston* v. *Heaven* (1), it was contended that coach owners were liable in all cases, except where the injury happens from the act of God or the king's enemies; but Eyre, C.J., held, that cases of loss of goods by carriers were totally unlike the case before him. In those cases the parties are protected, but, as against carriers of persons, the action stands *on the ground of negligence* alone. In *Christie* v. *Griggs* (2), in which the accident arose from the breaking of an axletree, Sir James Mansfield said: "If the axletree was sound as far as the human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events; but he did not warrant the safety of passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

Thus we see that the test in case of a carrier of passengers is, has he, "as far as human foresight can go, provided for their safe conveyance?" of course, this includes care and foresight in the making and procuring, as well as in using the carriage.

In the case of *Grote* v. *Chester and Holyhead Railway Company* (3), where *Sharp* v. *Grey* (4), to which I shall presently refer, was cited for the opinion of Alderson, J., that "a coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation," Parke, B., remarked: "In that case the coach proprietor is liable for an accident which arises from an imperfection in the vehicle, although he has employed a clever and competent coachmaker." Lord Wensleydale, by that observation, merely intended to express that a coach proprietor could not shelter himself

(1) 2 Esp. 533.
(2) 2 Camp. at p. 81.
(3) 2 Ex. at p. 255.
(4) 9 Bing. 457.

from the consequences of using an unsafe coach by the fact that he had employed a competent coachmaker to make it—which differs materially from implying a warranty against a defect which no amount of care or skill could discover.

The case of *Burns* v. *Cork and Bandon Railway Company* (1) comes the nearest in its facts to the present. In that case, in answer to an action for not carrying a passenger safely, it was specially pleaded, in substance, that, whilst he was being carried in a carriage on the defendants' railway, a fracture occurred in a crank-pin in one of the leading wheels of the locomotive engine, which was occasioned by an original defect in the material and construction of such crank-pin, which defect, before the fracture occurred, was not capable of being detected by the defendants upon due or proper examination or observation, and that the crank was purchased with the locomotive engine in due course of business, from competent manufacturers, and was not made by the defendants, and that before the commencement of the journey the defendants duly examined the said engine and crank-pin, and had not any notice of the defect in the same. To this plea, the plaintiff demurred; and Chief Baron Pigot, in delivering the opinion of the Court, stated the question to be whether, taking all the averments in the plea together, the defendants had stated facts which exempted them from liability for the breach of contract admitted by the plea. He then proceeds: "I am of opinion they have not, according to the existing state of the authorities. Although a carrier of passengers does not warrant the safety or the due arrival of his passengers, yet, I consider that he must be considered as warranting that the vehicle in which he conveys them is, at the time of the commencement of the journey, free from all defects, at least as far as human care and foresight can provide, and perfectly roadworthy." He then refers to *Christie* v. *Griggs* (2); *Sharp* v. *Grey* (3); and *Grote* v. *Chester and Holyhead Railway Company* (4); and proceeds as follows: "But, applying Sir J. Mansfield's test, have they shewn in their plea, that, as far as human care and foresight could go, they provided for the safety of their passengers? I think they have not. Their plea does not contain any averment

(1) 13 Irish Com. Law Rep. 543.
(2) 2 Camp. 79.
(3) 9 Bing. 457.
(4) 2 Ex. 251.

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as to the care and skill applied to the manufacture of the engine, or as to the care or skill exercised by them in the selection or inspection of it. All the averments in their pleas are quite consistent with gross and culpable carelessness on the part of the manufacturers, and with gross and culpable negligence on their part in the purchase of it from the manufacturers. If they had been the manufacturers of the engine, they would have been bound to aver and prove that due care and skill had been exercised in the process of its manufacture; are they to be relieved from legal liability because they allege that they have purchased it from a competent manufacturer? I think that would be a distinction dangerous to the public, and that, as Alderson, J., says, railway companies might buy ill-constructed or unsafe vehicles, and the public be without remedy."

Now, although one or two ambiguous phrases are used by the Chief Baron in his judgment, arising out of some error in the collocation of the words, he never intended, as it appears to me, to assert that there existed an implied warranty against latent defects which no amount of skill or care could have discovered, otherwise I should have expected it to have been at once so expressed, which would have rendered further reasons unnecessary. I think that the course of the argument and of the judgment shew that the discussion really turned upon the question of negligence, and not of warranty.

The authorities to which I have referred sufficiently illustrate the distinction between the liability of carriers of goods and that of carriers of passengers. The liability of the former is that of an *insurer*, whilst that of the latter is *only for negligence*. It further appears, from these cases, that the negligence which renders a carrier of passengers liable is something which might have been avoided, by the exercise of care, skill, or foresight, and that an accident which results from some cause which no amount of care, skill, or foresight could have discovered, cannot be said to be the result of negligence in the carrier.

In the case of carriers by water the same distinctions hold, so far as I am aware. In *Lyon* v. *Mells* (1) Lord Ellenborough said: "In every contract for the carriage of goods, between a person

(1) 5 East, 428, 437.

holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight, and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate sub-stratum of the contract that it is so. The law presumes a promise to that effect, without actual proof, and every reason of sound policy and public convenience requires it should be so." There are many authorities to the same effect, which it is not necessary to cite.

If it be said that it is a strange thing that a warranty of seaworthiness should be *implied by law* in the case of goods, and not of passengers, I can only answer, that in case of goods the warranty of seaworthiness is incidental to the liability of the carrier *as an insurer*. In *Coggs* v. *Bernard* (1) Lord Holt makes no distinction in this respect between carriers by land and carriers by water; and many of the reasons stated by him and Best, C.J. (2), to be the foundation of the liability of a carrier of goods by land apply with equal force to the carrier of goods by water; and certainly in no case, so far as I am aware, has there been a suggestion that the foundation of the liability of a carrier of passengers by water depends upon other considerations than those which regulate the liability of carriers of passengers by land.

In the present case the direction of my Brother Lush to the jury appears to me to have been unexceptionable, and in strict conformity with the cases above referred to. The fracture of the wheel-tire, by itself, and unexplained, might have been sufficient to raise a presumption of negligence against the defendants: *Skinner* v. *London and Brighton Railway Company* (3); *Carpue* v. *London and Brighton Railway Company* (4); *Bird* v. *Great Northern Railway Company*. (5) But upon the direction of my Brother Lush, when the explanatory evidence had been given, it must be taken to have been, in fact, found by the jury, that the

(1) 2 Lord Raym. 909, 918.
(2) In *Riley* v. *Horne*, 5 Bing. at p. 220.
(3) 5 Ex. 787.
(4) 5 Q. B. 747.
(5) 28 L. J. (Ex.) 3.

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breaking of the wheel-tire *was due to a hidden defect which no amount of care or skill could have discovered, either in the manufacture, purchase, or use.* I was at one time in doubt whether the principles applied and explained in the case of *Brown* v. *Edgington* (1)—said by Parke, B., in *Sutton* v. *Temple* (2), "to be long settled law"—did not govern this case; but I am now satisfied that they do not. In that case, although the "scienter, or guilty knowledge," as it was termed, was negatived by the jury, there was nothing to prove that the insufficiency of the rope might not have been discovered upon a careful examination; and I can find nothing to shew that the doctrine now contended for was in the minds of the judges who decided it. If the liability of a carrier of passengers for hire springs from the custom of the realm, or from an actual contract made, why are we to imply a warranty as to the *absolute sufficiency of the carriage*, when we do not imply any such warranty with regard *to the other incidents* of the journey? It would appear to be quite as reasonable to imply a warranty against accidents as against a hidden defect which no amount of skill or care could discover. I think that it would be extremely dangerous, and somewhat inconsistent, to extend the doctrine of implied *warranty beyond the possible means of the alleged warrantor to guard against the defects to which his warranty is supposed to extend.*

The cases cited in support of the plaintiff's right to recover do not, I think, when examined, go the length attributed to them; and they are neither so consistent nor precise as to conclude us from exercising our own judgment upon the facts before us; and, notwithstanding some expressions attributed to Lord Ellenborough and Best, C.J., I cannot but think that those learned judges had not present in their minds the idea that there existed, in the case of carriers of passengers, any *absolute* warranty of road-worthiness. In *Israel* v. *Clark* (3), where the injury arose from the breaking of an axletree, the expressions used by Lord Ellenborough are very wide—viz. that "he should expect a clear land-worthiness in the carriage itself to be established." Still, it is by no means certain that he had in view a case of latent defect which no skill or care

(1) 2 Man. & G. 279. (2) 12 M. & W. at p. 64.
(3) 4 Esp. 259.

could discover. No opinion was expressed shewing whether he considered that the cause of action rested upon negligence, or upon the doctrine of implied warranty.

In *Bremner* v. *Williams* (1) Best, C.J., is reported to have said, "that every coach-proprietor warrants that his stage-coach is equal to the journey it undertakes," and "*it is his duty to examine it previous to the commencement of every journey.*" The latter words shew to what matters he supposed the warranty to extend, and I think that it is only fair, considering the opinions already cited from other cases, in which, with more consideration, he had treated this subject, to assume that he did not refer to *latent* defects which could not be discovered on *examination.*

The decision which was most discussed before us is the case of *Sharp* v. *Grey* (2), but I am bound to say, that although the opinions expressed by Gaselee, J., and Bosanquet, J., in that case are apparently in antagonism to the direction given by my Brother Lush, it is not very easy to see, that the judges who decided it had in their minds a case of latent defect not discoverable by any amount of care or skill, or that they were unanimous in laying down any clear or precise rule of law which ought to govern us in this case; and it is to be observed that the Chief Justice Tindal left the case to the jury as a *question of fact,* although in somewhat loose and general terms, viz. "whether there had been on the part of the defendant that *degree* of vigilance which was required by his engagement to carry the plaintiff safely." And Park, J., is reported to have said, "it was a question of *fact for the jury.*" And Alderson, J., limits the extent of any implied warranty against defects to those "which could be seen at the time of construction." He adds, "and if the defendant were not responsible, a coach proprietor might *buy ill-constructed* or *unsafe vehicles,* and his passengers be without remedy." (3)

There are several modern cases, not referred to on the argument, which shew that the judges who tried them considered the action against carriers of passengers for hire to be founded on negligence. In *Stokes* v. *Eastern Counties Railway Company* (4), Chief Justice Cockburn thus expressed himself: "You are entitled to expect at

(1) 1 C. & P. 414.
(2) 9 Bing. 457.
(3) See note (2), post, p. 438.
(4) 2 F. & F. 691, 693, 694.

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the hands of a railway company all that skill, care, and prudence can do to protect the public against danger and accidents, but you must carry that principle into application as reasonable men. . . . If you are of opinion that the flaw or crack had become *visible* prior to the accident, that upon careful examination, not with the aid of scientific authorities and scientific instruments, but on an *ordinary, reasonably proper,* and *careful* examination, such as all feel ought to be made before the engines are used, on which the safety of a whole train may depend, this flaw might have been discovered, and that either the examination did *not* take place, or if it did, and the flaw was discovered, but the man, with careless disregard of his own safety and of others whose lives and limbs might be involved, treated all this with supine and reckless indifference, then undoubtedly there is negligence established, for which the company are, and ought to be, responsible."

That case is important, because the verdict was for the defendants, and if the doctrine now contended for by the plaintiff be the correct exposition of the law, the verdict in that case, if questioned, must have been set aside.

Again, in *Ford* v. *London and South Western Railway Company* (1), Chief Justice Erle, in summing up the case to the jury, said: "The action is grounded on negligence. The railway company is bound to take reasonable care, to use the best precautions in known practical use for securing the safety and convenience of the passengers." See also *Pym* v. *Great Northern Railway Company* (2), per Chief Justice Cockburn, to the same effect.

In this state of the authorities in our own courts and in Ireland, we are much assisted in arriving at a conclusion by several cases decided in the courts of the United States, cited in a note to the 7th edition of Story on Bailments, p. 565. In *Ingalls* v. *Bills* (3) the late Mr. Justice Hubbard, in a very able judgment, in which the English and American authorities are reviewed, states it to be the conclusion of the Court, "that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can

(1) 2 F. & F. at p. 732. (2) 2 F. & F. at p. 621.
(3) 9 Metcalf, 1, 15.

guard against; and if an accident happens from a defect in the coach which might have been discovered and remedied upon the most careful and thorough examination of it, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment, and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense."

This extract from the judgment of Mr. Justice Hubbard, in my opinion, truly expresses the rule of law applicable to the present case, and is in strict conformity with my Brother Lush's direction to the jury; and were it not for the opinion of my Brother Blackburn to the contrary, I should have considered that it was supported by the *weight* of English authority.

As the majority of the Court are in favour of the defendants, and think my Brother Lush's direction right, the rule obtained by the plaintiff will be discharged.

BLACKBURN, J. This was an action brought by a passenger on the defendants' railway, to recover damages for an injury he had received, owing to the breaking down of the carriage in which he was travelling.

On the trial, before my Brother Lush, it appeared that the carriage was one belonging to the London and North Western Railway Company, which had been for some time in use by them, and had come into the possession of the defendants in the ordinary course of traffic, and was (according to the ordinary arrangements between the different railway companies) used by the defendants till they could return it.

Evidence was given that, when the carriage was put into the train by the defendants, it was, to all outward appearance, reasonably sufficient for the journey, the tire of the wheel being of proper thickness, and apparently of sufficient strength; but that, in fact, there had been an air bubble in the welding, which

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rendered the tire much weaker than it appeared; so that, in fact, it was not reasonably fit for the journey; and that the breaking of this tire occasioned the accident. Evidence was given that this defect was one which could not be detected by inspection, nor by any of the usual tests, as it would ring to the hammer as if perfectly welded; and that there was no neglect on the part of the defendants or their servants, who took every reasonable precaution in examining the carriage.

My Brother Lush left the case to the jury, telling them that, if the accident was occasioned by any neglect on the part of the defendants, they should find for the plaintiff; but that if it was occasioned by a latent defect in the wheel—such that no care or skill on the part of the defendants could detect it—the verdict should be for the defendants. The jury found for the defendants; and it is not disputed that, if the direction was right, their verdict was justified by the evidence.

A rule nisi was obtained for a new trial, on the ground of misdirection, as it was contended that the defendants, as carriers of passengers, were bound at their peril to supply a carriage that really was reasonably fit for the journey, and that it was not enough that they made every reasonable effort to secure that it was so; in other words, that the obligation of the carrier to the passenger was equivalent to a warranty of the reasonable sufficiency of the vehicle he supplies. Cause was shewn in the sittings after Trinity Term, 1866, before my Brothers Mellor, Lush, and myself, when the Court took time to consider.

This is a question of very great nicety and importance, but, after some consideration and doubt, I have come to the conclusion that, on the balance of English authority, and, I think, upon the whole, in principle and by analogy to other cases, there is a duty on the carrier to the extent that he is bound at his peril to supply a vehicle in fact reasonably sufficient for the purpose; and is responsible for the consequences of his failure to do so, though occasioned by a latent defect; and, therefore, that the direction was wrong, and that there should be a new trial.

I have come to this conclusion with much doubt and hesitation, and (as my two Brothers are of a different opinion) I need not say that I am very far from being confident that I am not wrong; but

still I think it best to state the reasons why I differ from them. I quite agree that the carrier of passengers is not, like the carrier of goods, an insurer, who undertakes to carry safely, at all events, unless prevented by excepted perils. The carrier has not the control of the human beings whom he carries to the same extent as he has the control of goods, and therefore it would be unjust to impose on him the same responsibility for their safe conveyance. In order, therefore, to render the carrier of passengers liable for an accident, it is necessary to allege and prove that the accident arose from some neglect of duty on the carrier's part; but, if the obligation on the part of the carrier to provide a vehicle reasonably fit for the journey is absolute, a failure on his part to fulfil that obligation is quite enough to make him liable for all the consequences. And I own I see nothing to diminish the obligation to provide a reasonably safe vehicle in the fact that it is to be provided for the safety of life and limb, and not merely of property.

The carrier supplies and selects the carriage for the purpose of conveying the passenger who is obliged to trust entirely to the carrier; the passenger having no means of examining the carriage, and no voice in the selection of it. Now, it has been decided that one who contracts to supply articles for a particular purpose, does impliedly warrant that the articles he supplies are fit for that purpose: *Brown* v. *Edgington*. (1) The principle of that case, as I understand it, is that expressed by Maule, J., who says that the defendant having accepted an order for a rope for a particular purpose, which rope he was to select and procure, did undertake to furnish one fit for that purpose; and was therefore liable as on a breach of his contract if he furnished one unfit for that purpose, though that unfitness arose from a latent defect; and this principle would seem to apply to the carrier of passengers who supplies a vehicle. On the same principle, I think, it is that a shipowner warrants to the person who ships goods, that his vessel is seaworthy. Lord Tenterden, in Abbott on Shipping (2), states the law thus: "The first duty is to provide a vessel tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage. For if the merchant suffer loss or damage by reason of

(1) 2 M. & G. 279, 293.
(2) 5th edit. p. 218; 10th edit., by Shee, p. 254.

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any insufficiency of these particulars at the outset of the voyage, he will be entitled to a recompense. . . . An insufficiency in the furniture of the ship cannot easily be unknown to the master or owners; but in the body of the vessel there may be latent defects unknown to both. The French ordinance directs that if the merchant can prove that the vessel at the time of sailing was incapable of performing the voyage, the master shall lose his freight, and pay the merchant his damages and interest. (1) Valin, in his commentary on this article, cites an observation of Weytsen (2): 'That the punishment in this case ought not to be thought too severe, because the master by the nature of the contract of affreightment is necessarily held to warrant that the ship is good, and perfectly in a condition to perform the voyage in question, under the penalty of all expenses, damages, and interest.' And he himself adds that this is so, although before its departure the ship may have been visited, according to the practice in France, and reported sufficient; because on the visit the exterior parts only of the vessel are surveyed, so that secret faults cannot be discovered, 'for which by consequence,' says he, 'the owner or master remains always responsible, and this more justly, because he cannot be ignorant of the bad state of the ship; but even if he be ignorant, he must still answer, being *necessarily bound to furnish a ship good and capable of the voyage.*'" Lord Tenterden then notices the opinion of Pothier (3), that in such a case the owner should not be answerable for damages occasioned, by a defect which they did not, nor could know, though he agreed that they shall lose their freight; and Lord Tenterden observes in a note, that this opinion of Pothier is not quite consistent with his own principles laid down in the Traité de Louage. (4) However, this may be in the old French law, or the civil law, it is, I think, clear that, according to English law, either there is a breach of warranty, in which case the owner is responsible for all the consequences, or there is not, in which case there is no ground for depriving him of his freight. And I think that there is ample authority, in addition to what I have cited from Abbott on Shipping, for saying that by

(1) Ord. de la Marine, liv. iii. tit. 3, art. 12.

(2) Traité des Avaries, p. 10.

(3) Traité de Charte-partie, num. 30.

(4) Part. ii. ch. i. s. 4, par. 2.

English law such a warranty is implied where the carriage is by water.

In *Lyon* v. *Mells* (1), Lord Ellenborough, in delivering the considered judgment of the Court, says: "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires that it should be so. The declaration here states such a promise to have been made by the defendant; and it is proved by proving the nature of his employment, or, in other words, the law in such a case without proof implies it."

In *Gibson* v. *Small* (2), in explaining the reason why in a voyage policy of insurance there was an implied condition that the ship was seaworthy, as much when the insurance is on goods as when on the vessel, Parke, B., says: The shipowner "contracts with every shipper of goods that he will do so" (*i.e.* make the ship seaworthy). "The shipper of goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not. Hence, the usual course being that the assured can and may secure the seaworthiness of the ship, either directly if he is the owner, or indirectly if he is the shipper, it is by no means unreasonable to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it." It appears from this that this most learned judge thought it clear that the undertaking of the shipowner to the shipper of goods, as to seaworthiness, is co-extensive with the undertaking of the goods owner to his insurer.

I am certainly not aware of any case in which the question has arisen, whether there is a similar warranty between a shipowner and a passenger; but it seems to me that every reason that can be urged in favour of the warranty applies as much to the one case as

(1) 5 East, 428, 437. (2) 4 H. L. C. at p. 404.

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to the other. The passenger trusts to the shipowner to select a proper ship as much as the shipper of goods does; and all those circumstances exist which induced Valin (in the passage cited in Abbott on Shipping) to say that the shipowner, from the nature of his contract, was "necessarily bound to furnish a ship good and sufficient for the voyage;" or, as Lord Ellenborough says, in *Lyon* v. *Mells* (1), that his promise to do so is proved by proving the nature of his employment. Indeed, in the very probable case of a person shipping merchandize by the same vessel in which he himself takes his passage, it would seem rather extraordinary if the law were to hold that, as far as the goods were concerned, there was an implied undertaking to furnish a seaworthy ship, but as regarded the personal safety of the passenger there was none. It is true that the carrier of goods is an insurer, except against certain excepted perils, and that the carrier of passengers is not; but the question, whether the carrier of goods is bound at his peril to supply a seaworthy vessel, can only arise where the immediate cause of the loss is an excepted peril, or where for some other reason the contract to insure does not apply.

Assuming, then, that there is such a warranty implied where the carriage is to be by water, is there any difference where the carriage is by land?

The principle which I understand to be laid down in *Brown* v. *Elgington* (2), is this, that where one party to a contract engages to select and supply an article for a particular purpose, and the other party has nothing to do with the selection, but relies entirely upon the party who supplies it, it is to be taken as part of the contract implied by law, that the supply warrants the reasonable sufficiency of the article for that purpose, and I think *Lyon* v. *Mells* (3) lays down a very similar principle as generally applicable, though the particular instance was that of a lighterman. If this principle be a general one, it applies equally to the case of the shipowner supplying a ship and the carrier by land supplying a vehicle, whether it is supplied for the carriage of goods or passengers. In *Brass* v. *Maitland* (4), this principle was much discussed. I think the effect of the reasoning of the judgment of Lord

(1) 5 East, at p. 437.
(2) 2 M. & G. 279.
(3) 5 East, 428.
(4) 6 E. & B. 470; 26 L. J. (Q.B.) 49.

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Campbell and Wightman, J., shews that, in their opinion, this is a general principle of law; whilst the effect of the judgment of Crompton, J., is such as to shew that he did not think the principle general, and was not inclined to carry it further than the decisions had already gone. My respect for his opinion is very great, and if ever the question, whether there is such a general principle of law, should come before me in a court of error, I should endeavour to consider it carefully as an open question, without being too much biased by my present impression in favour of it; but sitting here in the same court in which that case was decided, I am bound to consider the decision of the majority right, and to act upon it so far as it bears on the present question.

The authorities on the very point now before us are not numerous. In *Israel* v. *Clark* (1), Lord Ellenborough is reported to have said that the carriers of passengers by land "were bound by law to provide a sufficient carriage for the safe conveyance of the public who had occasion to travel by them; at all events he would expect a clear landworthiness in the carriage itself to be established." This seems to shew that, in his opinion, the doctrine which in *Lyon* v. *Mells* (2) was laid down as to the persons furnishing lighters for the conveyance of goods, was applicable to those furnishing carriages by land for the conveyance of passengers, and that they were bound at their peril to provide vehicles in fact reasonably sufficient for the purpose. And in *Bremner* v. *Williams* (3), Best, C.J., is reported to have ruled the same way. These are, it is true, only Nisi Prius decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood.

On the other hand, in *Christie* v. *Griggs* (4), Mansfield, C.J., told the jury that "if the axletree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable, at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human

(1) 4 Esp. 259.
(2) 5 East, 428.
(3) 1 C. & P. 414.
(4) 2 Camp. at p. 81.

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care and foresight could go, he would provide for their safe conveyance. Therefore if the breaking down of the carriage was purely accidental, the plaintiff had no remedy for the misfortune he had encountered." We may depend on the accuracy of this reporter. Mansfield, C.J., here does not very accurately distinguish between the possible view of the case, that the misfortune might have arisen, though the vehicle was reasonably fit for the journey and so be purely accidental, and the possible view that the accident and the circumstances attending it shewed that the coach could not in fact be reasonably fit for the journey; but, on the whole, I think it must be taken, that he thought there was no warranty, such as would make the coach proprietor liable for a latent defect in the coach; but this was only an opinion at Nisi Prius.

In *Sharp* v. *Grey* (1), Tindal, C.J., is stated in the report in Bingham (2) to have directed the jury to consider whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely; which leaves it in doubt whether he told the jury that the defendant was bound at his peril to provide a fit vehicle, a failure to fulfil which duty would be properly described in the declaration as negligence, and left it to them to say if it was in fact reasonably fit; or whether he left it to the jury to say whether the defendant had not neglected some reasonably practicable means of ascertaining its fitness; but the counsel, in moving for a new trial, treat it as a direction that the defendant would be responsible, though he had conducted his business with all the caution that could be

(1) 9 Bing. 457.

(2) The case is also reported in 2 Moore & Scott, 620, with some material differences, and in 2 L. J. (C. P.) 45, with so strong a similarity as to amount to identity with the report in 9 Bingham, the marginal note, statement of facts, as well as the judgments of Park and Alderson, JJ., being almost totidem verbis. It is, however, remarkable that the judgments of Gaselee and Bosanquet, JJ., are omitted. In the report in 2 Moore & Scott the cause of action is said to have been laid as negligence in not providing a safe carriage; and the Chief Justice's direction to the jury is, "that the defendant was bound to provide a *safe* conveyance for the passengers he contracted to carry; and he left it to the jury to say whether or not the defendant had observed that extreme degree of care and diligence in the examination of his coach which the safety of his passengers required that he should observe." The judgments also differ considerably from the report in 9 Bingham.

reasonably required; and the judges, in refusing the rule, all appear to have so understood the ruling, and to hold it right.

I have already said that on the balance of reasoning I am inclined to think that such ought to be the law; but at present, sitting in a court of co-ordinate jurisdiction with the Common Pleas, I think it enough that the decision is in point.

In an American case, *Ingalls* v. *Bills* (1), given at length in the editor's note to Story on Bailments, s. 592, 7th ed. p. 565, the Court, after considering the English cases, came to a conclusion opposite to that which I have come to, expressly stating that they do not agree with the opinion of the Court of Common Pleas in *Sharp* v. *Grey* (2), if it is understood as I think it must be. It will be very fit, if the case at bar is taken into a court of error, that the reasoning of the American Court should be carefully and respectfully considered; and if it appear to the court of error satisfactory, they may act upon it, and overrule the case of *Sharp* v. *Grey*. (2) But it is clear that we, in the Court of Queen's Bench, cannot treat the American decision as an authority, to be placed on the same footing as the decision of the Court of Common Pleas.

The judgment of this case has been delayed until the argument in a case of *Hando* v. *London, Chatham, and Dover Railway Company* was heard, as it was anticipated that a similar point might arise in that case; but it was not necessary to decide it. (3)

(1) 9 Metcalf, 1.

(2) 9 Bing. 457.

(3) *Hando* v. *London, Chatham, and Dover Railway Company* (Q. B. May 6, 1867,) was an action by a wife to recover damages for the death of her husband. The deceased was killed by an accident which occurred while he was travelling in a carriage on the defendants' railway. The engine and train ran off the rails, and after the accident a spring of the engine was found broken, the fracture being quite fresh. Unless this breaking caused the engine to leave the rails, there was no evidence of the cause of the accident. The engine had been carefully examined before starting. At the time of the accident, the deceased was a workman at gasworks which the defendants were empowered by act of Parliament to keep up for their own use, and they had works at Battersea and Dover. The deceased was in the regular employ of the defendants, and it was part of his ordinary duty to go from one set of works to the other, as occasion required, about once a fortnight; he travelled by the defendants' railway free, and received 1*s.* for his extra expenses. He was so travelling on the occasion of his death.

Cockburn, C.J., before whom the cause was tried, directed a verdict for

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I think that the Irish case of *Burns* v. *Cork and Bandon Railway Company* (1) really throws no light upon the point before us. In that case, a plea was pleaded which was clearly intended to raise the very point before us, and which I own I should myself have thought did raise it. The Irish Court of Exchequer, in giving judgment against the plea, say that, if there is a warranty, the plea was clearly bad; and that even if there was only a duty to take every care, the plea did not sufficiently shew the fulfilment of that duty, and was therefore bad. Probably the Court were not agreed on the question, and intended to avoid expressing any opinion on it, though I should rather conjecture, from the language used, that the learned judge who wrote the judgment inclined to the opinion that there was a warranty.

I have only to add that I do not think that the duty to supply a seaworthy ship or a sufficient vehicle by land is equivalent to a duty to provide one perfect, and such as never can, without some extraordinary peril, break down, which would have the effect of making the carrier an insurer against all losses arising from any failure in the vehicle which cannot be shewn to arise from some unusual accident.

I had occasion, in the case of *Burges* v. *Wickham* (2), to consider what was the meaning of the term "seaworthy," as applied to a ship; and I see no reason to change the opinion which I then

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the defendants, and a rule having been obtained, pursuant to leave reserved, to enter it for the plaintiff,

Pollock, *Q.C.*, shewed cause, and maintained, first, that, as there was no negligence shewn, but the contrary, the defendants were not liable: for that carriers of passengers did not warrant the safety of their passengers: and he cited most of the cases noticed in the judgments in the principal case; secondly, that even if the defendants would have been liable had the deceased been an ordinary passenger, the relation of master and servant existed between him and the defendants, and the injury occurred in the ordinary course of his duty.

Powell, *Q.C.*, and *Prentice*, *Q.C.*, in support of the rule, were heard on the latter point only.

The Court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.) were clearly of opinion that the case was not distinguishable from *Morgan* v. *Vale of Neath Railway Company* (Law Rep. 1 Q.B. 149); *Feltham* v. *England* (Law Rep. 2 Q. B. 33), and *Tunney* v. *Midland Railway Company* (Law Rep. 1 C.P. 291), and discharged the rule. 12 Jur. N.S. 691

(1) 13 Irish Com. Law Rep. 543.

(2) 3 B. & S. 669, 693; 33 L. J. (Q.B.) 17, 26, 10 Jur. N.S. 92.

expressed, that it meant no more than that degree of fitness which it would be usual and prudent to require at the commencement of the adventure; and, applying a similar principle to a land journey, I agree with what I understand to have been the direction of Erle, C.J., in *Ford* v. *London and South Western Railway Company* (1), that the railway company are not bound to have a carriage made in the best of all possible ways, but sufficiently fulfilled their duty by providing a carriage such as was found in practical use to be sufficient. In other words, I understand the obligation to be, to furnish not a perfect vehicle, but one reasonably sufficient. But in the present case the carriage was not such as to be reasonably sufficient. Had the parties who sent it out known of the existence of this defect in the tire, there would have been strong ground for accusing them of manslaughter, if death had ensued. They did not know it, and could not discover it until the tire broke; and they are therefore free from all moral blame or criminal responsibility. The question, therefore, is distinctly raised, whether the obligation of the carrier of passengers to the passenger is merely to take every precaution to procure a vehicle reasonably sufficient for the service, whether by sea or by land, in which case the direction was right; or whether it is, as I think, an absolute obligation, at his peril, to supply one, or be responsible for any damage resulting from a defect.

Taking the view of the law which I do, I think the rule for a new trial ought to be made absolute, but the majority of the Court being of a different opinion, it must be discharged.

Rule discharged.

Attorneys for plaintiff: *Young, Maples, & Co.*
Attorneys for defendants: *Beale, Marigold, & Beale.*

(1) 2 F. & F. 730.

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April 18.

AUSTIN *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway Company, Liability of, for Negligence to a Passenger who, without Fraud, had not paid his Fare—Child above Three and under Twelve Years of Age—7 & 8 *Vict. c.* 85, *s.* 6.

By 7 & 8 Vict. c. 85, s. 6, railway companies are bound to carry, by certain trains, children under three years of age without charge, and are entitled to half the fare charged for an adult in respect of all children between three and twelve years of age. The plaintiff's mother, carrying in her arms the plaintiff, a child of three years and two months old, took a ticket for herself by one of these trains on the defendants' railway, but did not take a ticket for the plaintiff; in the course of the journey an accident occurred through the negligence of the defendants, and the plaintiff was injured. At the time the plaintiff's mother took her ticket no question was asked by the defendants' servants as to the age of the child; and there was no intention on the part of the mother to defraud the company:—

Held, that the plaintiff was entitled to recover against the defendants for the injury he had received.

DECLARATION, that the plaintiff, at the request of the defendants, became and was a passenger in one of the defendants' carriages, to be by the defendants safely and securely carried along their railway upon a certain journey for reward to the defendants, and the defendants received the plaintiff as such passenger to be carried as aforesaid, yet they did not use due or proper care or skill in carrying him, whereby he was injured.

Fourth plea, that the plaintiff, when he became a passenger and received the injuries complained of, was an infant between three and four years of age, and incapable of taking care of or acting for himself, and was then wholly under the care and control of Elizabeth Austin, his mother; that the defendants were, under their statutes, carriers of passengers for hire and reward, and were, as E. Austin, when the plaintiff became a passenger, well knew, entitled to charge and be paid certain reasonable hire and reward for the carriage and conveyance of the plaintiff as passenger upon his journey, and the plaintiff then became and was such passenger, and was conveyed as in the declaration mentioned without any hire or reward being charged or paid for or in respect of his being such passenger, or being so carried and conveyed on the journey, and upon the terms that he was to be carried and conveyed free of

charge, and the defendants then permitted him to become and he became a passenger upon such terms, and they were induced to permit him to become such passenger, and to be carried upon the journey by the false and fraudulent representations of Elizabeth Austin, that the plaintiff had not attained the age of three years, and was then an infant under the age of three years; and on the supposition, and in the belief that the representations were true, and that the plaintiff had not attained the age of three years, the defendants made no charge for his conveyance, and carried him as such passenger on the journey and without payment of the lawful and reasonable reward payable to them in that behalf, and free of all charge whatsoever. That the plaintiff was not then an infant under the age of three years, but on the contrary thereof had attained, and his age exceeded, three years, as E. Austin when the plaintiff became a passenger well knew. That the defendants did all things to entitle them to have notice that the plaintiff's age exceeded three years, and that he had attained and was not under the age of three years, and to have and receive the plaintiff as passenger on the terms that they were to be paid for carrying him upon the journey, but E. Austin did not give the defendants such notice, nor had the defendants any notice or knowledge, or means of knowledge, nor any reason to believe or suppose that the plaintiff had attained or was more than three years of age, and that no payment or reward was received, or to be received, nor was any charge made or to be made by them for the carriage and conveyance of the plaintiff as such passenger, and the grievances happened without any wilful neglect or misconduct on the part of the defendants.

Issue thereon.

At the trial before Pigott, B., at the spring assizes for Monmouthshire, the following facts were proved:—The plaintiff was a child three years and two months old. The plaintiff's mother, Elizabeth Austin, carrying the plaintiff in her arms, took a ticket for herself, but not for the plaintiff, on a journey from Crumlin to Merthyr by what is called "a parliamentary train," on the defendants' railway. In the course of the journey an accident happened to the train, and the plaintiff's leg was broken. At the time the plaintiff's mother took her ticket no question was asked her by the defen-

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dants' servants as to the age of the child, nor was she told by the defendants' servants that she ought to take a ticket for the plaintiff at half the price charged an adult person. The defendants admitted that the accident was caused through the negligence of their servants, but contended that they were not liable for the consequences of the negligence, because the plaintiff's mother, who had charge of him, had taken no ticket for him; and they relied on s. 6 of the 7 & 8 Vict. c. 85. (1)

The learned judge left the question of damages to the jury, and asked them whether the plaintiff's mother intended fraudulently to represent to the defendants' servants that the plaintiff was under three years of age. The jury negatived any intention on the part of the mother to commit a fraud, and found a verdict for the plaintiff for 50*l.*, leave being reserved to move to enter a verdict for the defendants on the fourth plea.

Huddleston, Q.C. (*A. S. Hill* with him), moved accordingly. The defendants were entitled to receive payment for the plaintiff, as a passenger, under the statute. It is true the plaintiff is a child of tender years, but there is a complete identity between him and his mother, and the concealment practised by her affects the claim of the plaintiff: *Waite* v. *North Eastern Railway Company*. (2) This case is analogous to the cases of concealment of a passenger as to the character of his luggage. If a carrier accept luggage to be carried with a passenger, and it turn out to be merchandize and

(1) 7 & 8 Vict. c. 85, s. 6: "Whereas it is expedient to secure to the poorer class of travellers the means of travelling by railway at moderate fares ..... be it enacted ..... that all passenger railway companies .... shall by means of one train at the least to travel along their railway from one end to the other of each trunk, branch, or junction line, belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, branch, or junction line, once at the least each way on every week day .... provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several acts of parliament, and with the immunities applicable by law to carriers of passengers by railway, and also under the following conditions ..... children under three years of age accompanying passengers by such train, shall be taken without any charge; and children of three years and upwards, but under twelve years of age, at half the charge for an adult passenger...."

(2) E. B. & E. 719; 28 L. J. (Q.B.) 258, 5 Jur. N.S. 936

is lost, the carrier is not liable for the loss: *Cahill* v. *London and North Western Railway Company* (1); *Great Northern Railway Company* v. *Shepherd.* (2)

[BLACKBURN, J., referred to *Belfast and Ballymena Company* v. *Keyes.* (3)]

The present case is distinguishable from *Marshall* v. *York, Newcastle, and Berwick Railway Company* (4), and *Great Northern Railway Company* v. *Harrison* (5), and also from *Great Western Railway Company of Canada* v. *Braid.* (6) In those cases, though no fare had been paid by the persons injured, they had not fraudulently become passengers; the cases only decide that every person is a passenger who is lawfully in the carriage of the carrier. Here there has been a concealment which is equivalent to a fraud, and the plaintiff never was lawfully a passenger. *Lygo* v. *Newbold* (7) also shews that if the plaintiff was in the carriage without authority, he cannot recover for any injury he may have sustained if an accident occurs.

COCKBURN, C.J. I think that there should be no rule in this case. The contract is to carry safely both the mother and the plaintiff. If that contract has been entered into under some misrepresentation on the part of the mother, she may be liable for the fare which she ought to have paid for the plaintiff, or for any penalty to which she may be subject by any enactment or bye law made under statutory powers. Her default does not alter the position of the company. The contract being to carry mother and child, through the negligence of the company the plaintiff was injured. I think the verdict right, and that therefore there should be no rule.

BLACKBURN, J. I am also of opinion there should be no rule. I think that what was said in the case of *Marshall* v. *Newcastle and Berwick Railway Company* (4) was quite correct. It was there laid down that the right which a passenger by railway has to

(1) 30 L. J. (C.P.) 289; 10 C. B. (N.S.) 154; in the Ex. Ch. 31 L. J. (C.P.) 271; 13 C. B. (N.S.) 818.
(2) 8 Ex. 30; 21 L. J. (Ex.) 286.
(3) 9 H. L. C. 556.
(4) 21 L. J. (C.P.) 34; 11 C. B. 655.
(5) 23 L. J. (Ex.) 308; 10 Ex. 376.
(6) 1 Moo. P. C. (N.S.) 101.
(7) 9 Ex. 302; 23 L. J. (Ex.) 108.

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be carried safely, does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely. If there had been fraud on the part of the plaintiff, or if the plaintiff had been taken into the train without the defendants' authority, no such duty would arise. Whether the mother's fraud could be treated as the fraud of the child so as to bring the present case within the principle of the cases which have been referred to, we need not now inquire. The averment of fraud which may be thought to make the plea valid is disproved. We must take it that the child, without fault and through an honest mistake on the mother's part, was taken into the train by the railway company and received as a passenger by their servants with their authority. Under those circumstances, does or does not the law require those who were carrying the child to take reasonable care that he should come to no damage? It certainly seems to me that a duty to carry safely arises under those circumstances. If there had been fraud on the part of the mother, it may be that she could not recover for an injury to herself; but in this case, the plaintiff being under three years of age, and therefore being incapable of fraud, and there being only a mistake on the part of the mother, I cannot but think that a duty was cast on the railway company to take reasonable care; and consequently I am of opinion that the verdict ought not to be disturbed.

SHEE, J. It seems to me that there was one entire contract to carry both the mother and child. It would not have made the least difference in my mind if the mother had taken two tickets, one for herself and one for the child, because even in that case there would have been only one contract to carry the mother and child. The plaintiff could not comply with the regulations of the company; he could not shew his ticket, or do anything which a passenger is required to do. The contract, therefore, was necessarily a contract with the woman for herself and her child, and was an entire contract; the company to a certain extent has had the benefit of it by receiving a part of the fare to which they were entitled, and they would be entitled to bring an action against the mother if a fraud had been committed by her. I think they were under a responsibility to perform their contract, and they having

undertaken to carry the mother and the child, the verdict was right and ought not to be disturbed. 1867

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LUSH, J. I am of the same opinion. I prefer to rest my judgment on the ground of contract. I think there was a contract to carry the mother and the child, and that contract operated in favour of each party. The only question is, whether the facts averred in the plea and found by the jury, negative the existence of any such contract as I have mentioned. I think they shew that there was an undertaking to carry the plaintiff. If the company entered into it under a mistake as to the age of the child, that does not make it the less a contract; we must hold that they did enter into a contract as carriers to carry the plaintiff safely, which they have failed to perform.

Rule refused.

Attorneys for defendants: *Young, Maples, Teesdale, & Nelson.*

HEYWORTH AND OTHERS *v.* HUTCHINSON. *April* 17.

Contract, Construction of—Sale of Specific Goods—Clause as to Decision by Selling Brokers—Condition or Warranty.

The defendant bought of the plaintiffs, at a price named, "413 bales of wool, to arrive ex *Stige*, or any vessel they may be transhipped in. The wool to be guaranteed about similar to samples in the selling brokers' possession; and if any dispute arises it shall be decided by the selling brokers, whose decision shall be final." On the arrival of the wool, it turned out not about similar to sample, and the brokers, after protest from the defendant, awarded that the defendant should take it at a certain abatement in the price of different bales:—

Held, that, as the contract was for the sale of specific goods, the guarantee was not a condition but only a warranty, and the defendant could not reject the wool on account of its inferiority; that the brokers had power to award as they had, and the defendant was bound to take the wool accordingly.

FIRST COUNT. That the plaintiffs, by Perkins & Robinson their brokers, agreed to sell to the defendant, who agreed to buy, certain wool to arrive, at the price of 10¼*d.* per lb. upon the following amongst other terms: the wool to be guaranteed about similar to samples in Perkins & Robinson's possession, and if any dispute arose it should be decided by the selling brokers, whose decision should be final; that the wool arrived, but the defendant

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refused to accept, claiming as damages the loss on resale, the price having fallen.

Second count, that after the wool arrived a dispute arose between the plaintiffs and defendant as to whether the wool was about similar to the samples, and was such wool as the defendant was bound to accept, and that Perkins & Robinson, the selling brokers, after due arbitration, awarded that the wool should be taken and accepted by the defendant at the allowance as to 180 bales of twopence per lb., as to 201 bales of one penny farthing per lb., and as to the remaining 32 bales of one halfpenny per lb.; breach, that the defendant would not accept the wool accordingly.

Pleas, to the first count. 1. A traverse of the agreement as alleged. 2. Setting out the agreement verbatim, and alleging that the plaintiffs were not ready to deliver the wool as agreed. 3. Repeating the allegations in the second plea, and alleging that the defendant did not make the default as alleged. 4. That it was a condition of the agreement that the defendant might refuse to accept if the wool was not about similar to the samples, and that it was not similar. To the second count. 5. A traverse of the agreement. 6. A traverse of the award. 7. That the selling brokers were not required by the plaintiffs within a reasonable time to decide the dispute, nor had the defendant notice. 8. That the selling brokers did not appoint a day for hearing the dispute, nor give notice to plaintiffs and defendant. 9. That the selling brokers did not give the defendant reasonable notice of the time appointed for the hearing. There were also pleas of fraud.

Issue taken on all the pleas.

At the trial, before Shee, J., at the spring assizes at Liverpool, it appeared that the action was brought for the non-acceptance by the defendant of certain wool which he had agreed at Liverpool to purchase of the plaintiffs, through their brokers Messrs. Perkins & Robinson; the following being the material parts of the contract or sale note:—

"Victoria Buildings, Hackin's Hey,
Liverpool, 7 April, 1866.

Mr. Richard Hutchinson,

Dear Sir,—We have this day bought on your account from our principals the following wool, viz. [then followed an enumeration

of different lots of wool, making altogether] 413 bales greasy Entré Rios, at 10¼d. per lb., to arrive ex *Stige*, or any vessel they may be transhipped in, and subject to the wool not being sold in New York before advice reaches the consignees to send the wool forward here. The wool to be guaranteed about similar to samples in Perkins & Robinson's possession, and if any dispute arises it shall be decided by the selling brokers, whose decision shall be final . . . &c.

We are, your obedient servants,

Perkins & Robinson."

The 413 bales arrived in Liverpool from New York by the *Sunrise*, in June, 1866, of which the brokers informed the defendant, and after examination they sent an account to him, stating that, as to 180 bales (specifically described), "These wools are not so good as the original samples by 2*d.* per lb."; as to 201 bales, "this parcel is not so good as sample by 1¼*d.* per lb."; and as to 37 bales, "this parcel is not so good as sample by ½*d.* per lb." The defendant afterwards inspected the wool, and refused to take it; and after due notice to, and under protest from, the defendant, on the 9th of August, 1866, the brokers formally awarded that the 413 bales "should be taken by the defendant at the following allowances," as set out in the second count.

Mr. Robinson, one of the brokers, was called as a witness, and said that the wool was not "about similar to samples," and that was the reason he made the allowances.

Certain disputed facts, which are immaterial for the present report, were left to the jury, and a verdict was taken by consent for 1747*l.*, with leave to move to enter a nonsuit or verdict for the defendant, if the Court should think him entitled on the true construction of the contract, the Court to amend any of the pleadings if necessary.

E. James, Q.C. (*Baylis* with him), moved accordingly, and contended that, under the contract, all the brokers had to decide was, whether the wool was or was not "about similar to samples;" that the evidence shewed that, although the wool was not about similar to samples, they had not decided this, but had awarded that the defendant should take the wool at a certain abatement in the

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price. They had no authority to do this, and therefore in any view the plaintiffs could not succeed in the present action.

COCKBURN, C.J. I think there should be no rule. The terms of the contract seem to me free from any reasonable doubt. This contract is for the sale of specific wools, to arrive by a particular ship; they are earmarked, so as to prevent the contract applying to any other wools; and they are guaranteed as about similar to samples. If the matter stood there, this being a sale of specific goods, though with a warranty, there would not be any right or power on the part of the buyer to reject the goods on the ground of their not being conformable to the samples; but the buyer's remedy would be either by a cross action on the warranty, or by giving the inferiority in evidence in reduction of damages. There is nothing in the contract to import a condition that the buyer shall be at liberty to reject the wools if not about similar to samples. But the parties have introduced a clause that if any dispute shall arise it shall be decided by the selling brokers. What is the effect of that provision? Mr. James would confine it to the simple case of deciding whether or not the wools were about similar; but that is far too narrow a construction, and it would lead to great inconvenience so to limit it. The contract means, the defendant agrees to buy these specific wools, the plaintiffs guaranteeing them to turn out of a certain quality; and if any dispute arises, owing to their inferiority, the selling brokers are to decide between the parties. Possibly under this the brokers' authority would extend to deciding that the inferiority is so great that the buyer need not take them at all; but it is not necessary to decide this point. It is quite clear that it was intended that, if the wools should turn out not about similar to samples, the brokers should have power to decide how far they were inferior, and what reduction was to be made in consequence in the price, so as to prevent any litigation in the matter. The way Mr. James reads the contract would leave the parties still to the necessity of litigation after the brokers had decided the preliminary question as to quality of the wools.

BLACKBURN, J. I am of the same opinion. The contract relates to the particular bales of wool specified, and to those only;

and the additional clause that the contract is to be off if the bales are previously sold in New York, shews that the contract is confined to this particular cargo. Then the wools are "guaranteed about similar to samples." Now, such a clause may be a simple guarantee or warranty, or it may be a condition. Generally speaking, when the contract is as to any goods, such a clause is a condition going to the essence of the contract; but when the contract is as to specific goods, the clause is only collateral to the contract, and is the subject of a cross action, or matter in reduction of damages, according to the case of *Mondell* v. *Steel.* (1) Here there is, I think, merely a warranty as distinguished from a condition; so that, if an action were brought, the question would be, was the contract broken or not? and if so, how much reduction ought there to be made, in estimating the damages, from the contract price in consequence of the inferiority of the goods? But instead of leaving the parties simply to an action, the contract goes on to say: "If any dispute arises it shall be decided by the selling brokers." Mr. James says, they are merely to decide the question, aye or no, are the goods "about similar to samples?" But I think the meaning is, that the brokers are to proceed and decide the case on the principle enunciated in *Mondell* v. *Steel.* (1) If the inferiority were so great as to amount in effect to a different article, possibly the brokers might have power to decide that the contract was off, and the buyer not bound to accept; but they certainly were not bound so to decide. It seems to me clear that they had power to reduce the prices to be paid; that they have done in effect, though they call it an allowance.

SHEE, J. I am of the same opinion. The contract being clearly for the sale of specific goods, it may be doubtful whether the brokers would have had power to say the goods shall be rejected; but it is not necessary to decide this. They certainly had authority to decide whether the wools were about similar to samples, and to say what allowance ought to be made in the price in respect of their being inferior.

LUSH, J. This was not a contract to supply any goods answer-

(1) 8 M. & W. 858, 870.

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ing the description, but a contract to sell specific goods with a warranty of their being about similar to samples; and clearly by the general law there was no power in the buyer to reject them because they did not answer the description. What, then, was the special authority given by the contract to the brokers? Either they had or had not power to say that the buyer might reject the wools: if they had not this power the defendant was bound to accept the wools; if they had the power they have not exercised it. In neither view, therefore, could the defence be sustained.

Rule refused.

Attorneys for defendant: *Dubois & Maynard, for Gamble & Leech, Derby.*

May 13. IN THE MATTER OF THE LIQUIDATORS OF THE ANGLO ITALIAN BANK (LIMITED) AND FRANCOIS DE ROSAZ.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 161, 162—*Arbitration—Appointment of Umpire by Judge's Order—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 12.

By ss. 161, 162 of the Companies Act, 1862, on any company being voluntarily wound up, it is lawful by special resolution to transfer the business, &c., to a new company, provided that any dissentient shareholder may require the liquidators either to abstain from carrying the resolution into effect, or to take his shares at a price, if not agreed upon, to be determined by arbitration under the provisions of the Companies Clauses Consolidation Act, 1845. That act (8 Vict. c. 16), by ss. 128—130, provides for the appointment of two arbitrators, one by each party; and the arbitrators are to appoint an umpire; but in case of their default, s. 131 only provides that, if one of the parties be a railway company, the appointment of an umpire is to be by the Board of Trade. A dispute as to the price to be paid for his shares having arisen between a shareholder and a company not a railway company, and the arbitrators having neglected to appoint an umpire:—

Held, on the authority of *Re Lord* (1 K. & J. 90; 24 L. J. (Ch.) 145), that the case was within s. 12 of the Common Law Procedure Act, 1854, and a judge could therefore appoint an umpire under that section.

THIS was a rule calling on François de Rosaz to shew cause why an order of Lush, J., appointing an umpire, should not be set aside.

A resolution was passed at a meeting of the Anglo Italian Bank, Limited, on the 26th September, 1866, and confirmed on the

24th of October, 1866, for the voluntary winding-up and reconstruction of the company. De Rosaz, a dissentient shareholder in the company, caused a notice to be served on the liquidators and on the directors of the company, on the 30th of October, under s. 161 of the Companies Act, 1862 (25 & 26 Vict. c. 89), to abstain from carrying the resolution into effect, or to purchase De Rosaz' shares and interest in the bank at the amount he had paid for them. This request not having been complied with, De Rosaz gave notice under his hand that he had appointed C. M. Fisher an arbitrator, by whom the disputes and differences existing between De Rosaz and the liquidators of the bank, respecting the purchase of his shares and interest, and the amount which he required to be paid to him for them, should be determined, and requiring the liquidators to appoint an arbitrator on their behalf, under s. 162. (1) On

(1) 25 & 26 Vict. c. 89, s. 161: "Where any company is proposed to be, or is in the course of being, wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive, in compensation or part compensation for such transfer or sale, shares, policies or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or, in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member, at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing addressed to the liquidators, or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase money to be paid before the company is dissolved; and to be raised by the liquidators in such manner as may be determined by special resolution," &c.

s. 162. "The price to be paid for the purchase of the interest of any dissentient member may be determined

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the 9th of January, 1867, the liquidators, under protest, appointed J. F. H. Read arbitrator on their behalf.

Articles of association of the bank had been duly made and enrolled.

By Article 196, whenever any difference arises between the company on the one hand, and any of the shareholders, their heirs, executors, administrators, or assigns, on the other hand, touching the true intent or construction, or the incidents or consequences of these presents, or of the statutes, or touching anything then or to be thereafter done, executed, omitted, or suffered in pursuance of these presents, or of the statutes, or touching any breach or alleged breach of these presents, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises or to these presents, or to the statutes, or to any of the affairs of the company, every such difference shall be referred to the arbitration of two persons.

Article 201. If the arbitrators do not, within fourteen days after their appointment, appoint an umpire, then, on the application of the parties in difference, or either of them, an umpire may be appointed by the governor of the Bank of England, or by a judge under the Common Law Procedure Act, 1854 (1); or if the arbi-

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by agreement; but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the purposes of such arbitration the provisions of the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16), with respect to the settlement of disputes by arbitration, shall be incorporated with this act; and in the construction of such provisions this act shall be deemed to be the special act, and 'the company' shall mean the company that is being wound up, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, if only one, or any two or more of the liquidators if more than one."

8 Vict. c. 16, ss. 128 and 129, enact that, unless the parties agree to a single arbitrator, each is to appoint one; and by s. 130, the arbitrators are to appoint an umpire; by s. 131, "if the arbitrators shall refuse, or shall for seven days after request of either party neglect, to appoint an umpire, it shall be lawful for the Board of Trade, if they think fit, in any case in which a railway company shall be one party to the arbitration, on the application of either party, to appoint an umpire."

(1) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 12: "If in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in

tration shall take place out of the United Kingdom, then by Her Majesty's Consul-General for the place in which such arbitration shall be proceeded with.

The arbitrators not having appointed an umpire, a summons was taken out at the end of January, and the order in question made on the 5th of February.

Holl shewed cause. The order was rightly made. The first objection is to the notice given by De Rosaz, that it puts the alternative to purchase the shares at the price which he gave for them, and not at the price "to be determined as in the act mentioned."

[BLACKBURN, J. The price which the shareholder demands for his shares must be communicated at some time or other; why not in the original notice? As at present advised, I think there is nothing at all in this objection.]

The second point is, that as s. 162 of 25 & 26 Vict. c. 89, incorporates the provisions of 8 Vict. c. 16, and s. 131 of that act, as to the appointment of an umpire in default of an appointment by the arbitrators, only applies where a railway company is one of the parties, there is no means of appointing an umpire under that act;

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the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not shew that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not shew that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance, any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, or third arbitrator respectively, shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties."

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but the articles of association, probably to obviate this very difficulty, provide for the appointment of an umpire; and the articles of association, by ss. 14 and 16 of 25 & 26 Vict. c. 89, are as binding on the shareholders as the statutes themselves. It is said that this is not a dispute within the meaning of articles 196 and 201, because it is a dispute between the liquidators and a shareholder, and not between him and the company; but s. 161 expressly says that the company shall not be dissolved until the purchase money has been paid.

[BLACKBURN, J. In the case of *Re Lord* (1), Wood, V.C., held that s. 12 of the Common Law Procedure Act, 1854, applied to precisely such a case as the present, where a private act of parliament had provided that a dispute should be settled by arbitration under the provisions of the Companies Clauses Consolidation Act, so that it is unnecessary to resort to the articles of association.]

The Court then called upon

Mellish, Q.C., in support of the rule. This is not a case of arbitration within the Common Law Procedure Act; it is a mere valuation: *Collins* v. *Collins* (2); *Bos* v. *Helsham*. (3) The case of *Re Lord* (1) puts a very forced construction on the statute.

BLACKBURN, J. The parties here have clearly differed. The case before Wood, V.C., is directly in point, and is sufficient authority for us; whether I should have come to the same conclusion or not in the first instance, is another matter.

MELLOR, SHEE, and LUSH, JJ., concurred.

Rule discharged.

Attorneys for the bank: *Bircham & Co.*

Attorneys for De Rosaz: *Ewbank & Partington.*

(1) 1 K. & J. 90; 24 L. J. (Ch.) 145.

(2) 20 Beav. 306; 28 L. J. (Ch.) 184.

(3) Law Rep. 2 Ex. 72.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF SAINT PANCRAS, RESPONDENTS; *v.* THE OVERSEERS OF NORWOOD, APPELLANTS. 1867 *May* 14.

Poor—Removal—Irremoveability—Residence of Husband in one Parish, Wife residing in another—9 & 10 *Vict. c.* 66, *s.* 1.

A surgeon in a private lunatic asylum in the parish of N. married, and being required to board and lodge in the asylum, he took lodgings for his wife in the parish of P., about eight miles distant, and he was in the habit of visiting her nearly weekly, and staying with her from the Saturday evening to the Monday morning; the wife had thus lived in P. for six years, when the husband having been convicted and sentenced to imprisonment, she became chargeable to P.:—

Held, that the husband had been resident in N., and not in P., and that the wife and her children were therefore removeable from P.

ON appeal to the Middlesex quarter sessions against an order for the removal of Elizabeth Ormsby and her four children from the respondent parish to the appellant parish, the sessions confirmed the order, subject to the following case:—

On the 18th of September, 1865, Joseph Ormsby, the husband of Elizabeth Ormsby, and the father of her four children, was convicted of bigamy at the Central Criminal Court, and was at the time of making the order and of hearing the appeal a prisoner under the conviction in the gaol at Bedford. For about eighteen years before the conviction, Joseph Ormsby had been house surgeon at a private licensed lunatic asylum at Southall, in the parish of Norwood, in the county of Middlesex, and so continued until within one week before he was taken into custody under the above charge. While such house surgeon, and many years ago, he formed the acquaintance of his wife Elizabeth, then a servant in the same establishment, whom he married; but she never resided with him in the asylum as his wife, she having left the asylum when the marriage took place. He was paid 45*l.* a year, at first quarterly, but during the last year prior to his leaving, monthly, was subject to a quarter's notice, and such notice was in fact given to him and expired a week before he was taken into custody, when he left the asylum as before mentioned. He was supplied with board and lodging at the asylum, and as such house surgeon it was

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his duty and he was expected to live at the asylum. He had been in the habit of taking the Sunday, but at no other time did he go away from the asylum without leave. About six years before his conviction, Ormsby being then married to Elizabeth, and having then three of the four children by her, took apartments at 23, Red Hill Street, in the respondent parish, for his wife and children, and there the wife and children continuously resided, until the order of removal was made, and there the fourth child was born.

J. Ormsby paid the rent of the apartments and supplied his wife with money for necessaries. He visited his family at the said house, at first frequently coming on the Saturday and remaining till the Monday morning, but latterly he did not come so often, absenting himself sometimes for two or three weeks. After his discharge from the asylum he lived and slept at the said apartments with his wife and family during the week, until he was taken into custody as aforesaid, and slept there the last night before he was so taken. The distance from Southall to Red Hill Street is about eight miles.

The settlement of the wife and children is in the appellant parish.

It was contended for the appellants that, upon these facts, the wife and children were not removeable from the respondent parish; and on the part of the respondents that they were removeable.

The sessions held that they were removeable, and confirmed the order.

Poland, and *Le Breton*, for the respondents. The wife and children were removeable. The husband was personally resident beyond all question at the asylum, and he cannot be resident at two places at once for the purpose of acquiring irremoveability.

[BLACKBURN, J. I think that must be conceded.]

The question, therefore, when a man has a residence at two places, is, which is his permanent dwelling-place: per Crompton, J., in *Reg.* v. *Stapleton* (1); and whether the absence from the one place in the other is of a permanent or temporary character: per Lord Campbell, C.J., in the same case. *Wellington* v. *Whit-*

(1) 1 E. & B. 766; 22 L. J. (M.C.) 102, 17 Jur. 549

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church (1) is to the same effect. It is impossible to say, when a man has lived for six days out of the seven during six years in a place, that he was not resident there; and the fact of where his wife and family resided in such a case is immaterial, although he visit them regularly.

Keane, Q.C., and *Metcalfe*, for the ~~respondents~~ appellants. The general maxim is, "ubi uxor ibi domus." The present case is an instance of a man being absent on business for several days in the week, but returning home regularly to his wife and family once a week. This case is precisely within the distinction taken by Cockburn, C.J., in *Wellington* v. *Whitchurch* (2) :—"The maxim that a man's house is where his wife lives does not apply to the present case, but to a case where a man is in one place, and goes backwards and forwards to another where his wife lives, and resides at times with her in that place." These temporary absences are no break of residence: *Reg.* v. *Brighton.* (3)

BLACKBURN, J. I am of opinion that the sessions were right. I think the husband was resident in Norwood, and not in St. Pancras where his wife had lodgings. The real question in such a case as the present, in which the husband lives in one place and his wife and family in another, is, where was the husband, the head of the family, resident? Primâ facie, no doubt a man's home is where his wife lives, and so he may be said to be resident there. But he may be, as in the present case, only a sojourner there, or an occasional though regular visitor. Now, in the present case the husband had been resident for years at the asylum, and when he married he still slept there as before, but he took lodgings for his wife elsewhere, and for the last six years in St. Pancras, and did no doubt regularly visit her there. But was it his residence? I think not. The occasional, or even regular visiting at lodgings which he had taken for his wife is not enough to cause us to say that he had ceased to have his residence in Norwood. We must look at all the circumstances of the case taken together, and I think it is impossible to say that the husband did not reside in Norwood; and if so, he did not reside in St. Pancras; conse-

(1) 4 B. & S. 100; 32 L. J. (M.C.) 189, 10 Jur. N.S. 37 (2) 32 L. J. (M.C.), at p. 192. (3) 4 E. & B. 236; 24 L. J. (M.C.) 41, 1 Jur. N.S. 138

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quently his wife and family are not irremoveable from that parish.

LUSH, J. I am of the same opinion. When Joseph Ormsby married, his residence was beyond all question in Norwood, and on his marriage he continued in the same service, living in the asylum on the same terms as before, and he took lodgings for his wife, intending to continue as before to sleep at the asylum. He therefore continued to reside at Norwood. Put the converse of this case: it would be an extremely strong thing to say that the husband could have been removed from Norwood because he was not resident there, but in St. Pancras, where his wife resided.

Order confirmed.

Attorney for appellants: *H. H. Lawrence, for Clark & Austin, Brentford.*

Attorney for respondents: *W. Durrant Cooper.*

May 15.

JONES, APPELLANT; HUXTABLE, RESPONDENT.

Bread, sale of, otherwise than by weight—6 & 7 *Wm.* 4, *c.* 37, *s.* 4—3 *Geo.* 4, *c.* cvi. *s.* 4.

Section 4 of 6 & 7 Wm. 4, c. 37, enacts that all bread within the limits of the act shall be sold by weight, and any baker or seller of bread who shall sell or cause to be sold any bread in any other manner than by weight shall forfeit a sum not exceeding 40s.

The practice in the appellant's bakery and shop was to weigh out dough for 2lb., 4lb., and 8lb. loaves before putting them into the oven, allowing 5 oz. for shrinkage of a 4lb. loaf, which is the understood weight of a "quartern" loaf, but not to weigh the loaves afterwards unless required by the customer. A customer asked, in the appellant's shop, for a "quartern" loaf, and one was handed to him, and the current price of a 4lb. loaf was asked and paid for it. The customer did not require to have the loaf weighed, and it never had been weighed since it was baked; it turned out 2 oz. 9 drs. deficient of 4lbs.:—

Held, that the appellant was rightly convicted under the above section.

CASE stated by a justice of the borough of Newport, Monmouthshire, under 20 & 21 Vict. c. 43:—

An information was preferred by the respondent, inspector of

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weights and measures for the borough, against the appellant, a baker and seller of bread, under s. 4 of 6 & 7 Wm. 4, c. 37 (1), which charged that the appellant did, on the 3rd of January, 1867, at &c., then and there unlawfully sell bread not by weight; and the appellant was convicted of the said offence, and adjudged to pay a penalty of 15*s.* and 15*s.* costs.

Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that one Thomas Williams, by direction of the respondent, on Thursday, the 3rd of January, 1867, called at the shop of the appellant and asked for a quartern set loaf of bread, and, paying 7½*d.* for it, received a loaf of bread from the shopman, which he (Williams) handed to the respondent. The loaf was not weighed by the seller, and on its being weighed by the respondent was found to be 2 oz. 9 drs. short of 4lbs., the recognised weight for a quartern loaf. The loaf was produced in evidence.

The attorney for the appellant stated that he could not contend that the bread bought by Williams was weighed at the time of sale; but he contended that the object of the statute was to prevent people making up loaves and selling by guess, and he maintained that, as all the appellant's loaves had been weighed before being put into the oven, and due allowance had been made for the loss in the process of baking, the statute had been complied with. In opposition to this view, it was stated that dough was not bread, and that baking dough by weight was not selling bread by weight.

The case having been adjourned, at the adjourned hearing

(1) 6 & 7 Wm. 4, c. 37, s. 4: "That from and after the commencement of this act all bread sold *beyond the limits aforesaid* shall be sold by the several bakers or sellers of bread respectively *by weight*, and in case any baker or seller of bread shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding 40*s.* which the justice or justices before whom such offender or offenders shall be convicted shall order and direct: Provided always that nothing in this act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same."

The limits aforesaid are, "the city of London and liberties thereof, and beyond the weekly bills of mortality and ten miles of the Royal Exchange:" 3 Geo. 4, c. cvi. s. 4, is in identical terms as to sale *within* the limits aforesaid.

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Charles Stephens and David Lewis were called as witnesses for the appellant, and gave evidence as follows:

Charles Stephens: I am foreman at the bakery of the appellant. I have been with him and his father as such, I think, nineteen years. I have to weigh all the dough for the set bread. We weigh it out in separate loaves, viz. 2lb., 4lb., and 8lb. loaves. Five ounces are allowed for every quartern loaf for shrinkage in the oven, and every quartern loaf should weigh 4lbs. when baked. It does so when it comes out of the oven. In placing the loaves in the oven they generally adhere together. We send them away in a cart, or to the shop as they may be wanted after baking. It is the general practice in the trade to allow 5 oz. on a quartern loaf. I believe the loaf produced is of my baking. It is very much my style. According to my experience bread makes its weight when it comes out of the oven. In a dry east wind bread would lose 2oz. in twenty-four hours: the longer it is kept the more weight it would lose. Cross-examined: We weigh the dough into the oven. We do not weigh the bread when it comes out of the oven, and did not do so on Tuesday, Wednesday, or Thursday last. A loaf in a draught might lose two ounces in a night. I did not weigh the loaf produced.

David Lewis: I am shopman to the defendant. On Thursday last, January 3rd, I sold a quartern loaf to Thomas Williams. The loaf produced is the one, I believe. He came about middle day. He said, I want a quartern loaf; I am in a hurry to go by train. I sold him the loaf for $7\frac{1}{2}d.$ A quartern loaf is 4lbs., and a half-quartern should be 2lbs. This loaf was one received from the baker, Stephens. Thomas Williams did not ask me to weigh it. Nothing was said about weight. Every quartern loaf should weigh 4lbs. I know nothing of the baker's business. If customers ask to have the bread weighed we do so invariably. All our set bread is sold as of so much weight. Cross-examined: I did not offer to weigh this loaf: $7\frac{1}{2}d.$ was the sum paid, and was the price on Thursday. I often offer to weigh bread, but the customers won't have it so. When the bread comes from the baker or bakehouse to the shop we never weigh it.

Upon this evidence, and that of the respondent and his witness, Thomas Williams, the justice convicted the appellant under s. 4

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of 6 & 7 Wm. 4, c. 37, of selling the loaf of bread not by weight, it being proved and admitted that such loaf never was weighed after it came from the oven as bread, and it not being French or fancy bread, and the price on the day of sale being $1\frac{7}{8}d.$ per lb.

The question for the Court was, whether the conviction was valid.

F. A. Bosanquet, for the appellant. (1) The conviction was under s. 4 of 6 & 7 Wm. 4, c. 37, for selling bread otherwise than by weight. What the appellant was guilty of, if anything, was selling a 4lb. loaf under weight, but that is not made an offence by the statute. It is quite clear, indeed it is stated in the case, that by "quartern" loaf is understood a 4lb. loaf. The customer, therefore, must be taken to have asked for, and had handed to him, simply a light 4lb. loaf. That is not selling otherwise than by weight.

[LUSH, J. The magistrate has not found that "quartern" has acquired the meaning of a 4lb. loaf.]

Section 3 allows bread to be made of any size or weight: ss. 6 and 7 require scales to be ready in the shop or cart of the seller, as the case may be; but by those sections the bread need not be weighed unless the purchaser require it to be weighed in his presence, which shews that the selling without weighing at the time of sale is not the offence contemplated by the 4th section.

[LUSH, J. There are two distinct offences created by this statute; one of selling otherwise than by weight, and the other of refusing to weigh when required by the customer.]

No doubt; but the mere fact of not weighing the loaf at the time of sale does not make it a sale otherwise than by weight.

J. A. Russell, for the respondent. The intention of the act was to prevent selling bread by denomination, in order that the customer may be sure of getting his money's worth in weight.

[BLACKBURN, J. The 3 Geo. 4, c. cvi. (2), which regulates the sale of bread in the Metropolis, required by s. 7 that for two years after the passing of the act every baker should weigh the bread in the presence of the customer before handing to him, whether asked

(1) The respondent's counsel was not in court when the case was called on.

(2) See 1 Burns' Just. tit. Bread, p. 420.

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by the customer to weigh it or not. But, whatever may be the reason, there is no such duty now imposed on bakers in general.

LUSH, J. The London Act (s. 6) also forbids the sale by the denomination of quartern or half-quartern, but there is no corresponding enactment in the present act.]

No doubt, selling without weighing at the time of sale is not made an offence; but it is impossible to sell by weight if the bread has never been weighed. A sale of a quartern loaf is a sale by denomination.

[LUSH, J. Selling by weight means according to the weight. Here a sum is charged for a lump called a quartern loaf.]

BLACKBURN, J. I am of opinion that the conviction was right. The statute in question enacts that no bread shall be sold except by weight; it does not in terms say that the bread shall be weighed before or on the sale, although that would seem to be necessary in order to comply with the statute; nor that if sold by loaf it shall weigh a certain weight; but it simply says that all bread shall be sold by weight. Now, whether a particular loaf is sold by weight or not is a question of fact. Here, the magistrate says that on the sale of this loaf there was no weighing, and no statement of a charge of so much per pound, but a demand and payment of so much for the quartern loaf, which turns out deficient in the weight which a quartern loaf is understood to weigh. The offence is selling otherwise than by weight, and had there been a sale in terms of a 4lb. loaf, and if by mistake, or even if intentionally, it had turned out deficient in weight, the seller would have incurred no penalty, the statute not making this an offence; but the buyer has the remedy in his own hands, by insisting on having the loaf weighed in his presence. Here a sum per loaf, not per lb., is charged for; and the facts of the course of business, and of the course pursued at the appellant's bakehouse, that the loaves are weighed before baking and never after, is strong evidence that the owner is selling by loaf and not by weight. I do not think it is obligatory on the seller to weigh at the time of sale: but unless the loaf were weighed then, or shortly before, inasmuch as it was proved that bread soon loses weight, there would be strong evidence to shew that the seller was not selling by weight. The magistrate

has drawn that conclusion from the evidence before him, in which I think he was fully justified.

SHEE, J. I am of the same opinion. The intention of the statute was to provide security to persons buying bread, that they should get full weight for their money. By s. 3, the baker may make a quartern or any other sized loaf; but s. 4 says, whatever its size or denomination it shall be sold by weight, the intention being to compel bakers and sellers of bread to sell by weight, in other words to ask and receive so much per lb. and oz. In the present case, the baker possibly professed to sell by weight, inasmuch as he sold a quartern loaf, which is understood to weigh, and which possibly he meant should weigh, 4lbs. But, in fact, he did not sell by weight, for he took no care to ascertain that the loaf weighed 4lbs. On the contrary, it was proved that loaves weighed as dough before baking, hardly ever weighed the given number of pounds after baking. The statute does not compel a seller to weigh the bread at the time of sale, but in order to sell by weight it was incumbent on the appellant to ascertain before selling that what is understood as a 4lb. loaf was a 4lb. loaf. If he did not do this, but simply sold a quartern loaf, then he sold by denomination and not by weight, and he incurred the penalty imposed by the 4th section.

LUSH, J. I am of the same opinion. The statute, intended for the protection of buyers, prohibits the seller of bread from selling otherwise than by weight: that is by charging for the loaf so much per lb., according to its real weight. The question is, was the magistrate justified in finding that the appellant sold this loaf otherwise than by weight? I think the magistrate was fully justified in so finding. As I understand the case, the practice in the appellant's bakery is to weigh the dough before it is put in the oven, and it may be intended that the quartern loaf shall weigh 4lbs. after baking, and it sometimes does weigh as much, never more, and generally less; but he never weighs the loaves after they are baked. That is a very strong fact against the appellant, more particularly when he admits how much a loaf may lose in certain states of the weather, particularly with an easterly wind. Now, when we find a baker so acting, and selling a quartern loaf

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without ever having weighed it after baking, I think we are led irresistibly to the conclusion that he does not sell by weight but by denomination. True there is no provision compelling a baker to weigh the loaf unless the customer requires it; but I do not see how a man can sell by weight an article, called a quartern loaf and which may be expected to weigh 4lbs. but which has never been weighed, without weighing it at the time of sale. The appellant's course of business seems to me a systematic sale by denomination and not by weight.

Conviction affirmed.

Attorneys for appellant: *Thomas White & Sons, for Llewellin, Newport.*

Attorneys for respondent: *J. & C. Cole.*

May 13.

THE QUEEN *v.* GAUNT AND ANOTHER.

*Bastardy Order—Jurisdiction of Justices—Previous Dismissal on Merits no Bar—*7 *&* 8 *Vict. c.* 101, *ss.* 2—4.

7 QB 818, 20, 2
11 QBD 76.
25 QBD 235
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A bastardy summons, under 7 & 8 Vict. c. 101, s. 2, having been heard and dismissed on the merits, one of the chief witnesses for the defendant was afterwards convicted of perjury on the evidence he had given. A fresh application was then made, and on the hearing of the summons, it was objected for the defendant that the justices had no jurisdiction, by reason of the previous dismissal on the merits. The justices determined to hear the application, saying the previous dismissal was obtained by false evidence; and, having heard the applicant and corroborative evidence, made an order of affiliation:—

Held, that the justices had jurisdiction, and the order was valid.

RULE calling on two justices of Staffordshire to shew cause why a writ of certiorari should not issue to bring up an order of affiliation for the purpose of quashing it, on the ground that a previous application in the same matter had been heard and dismissed on the merits.

On the 27th of June, 1866, a bastardy summons was heard before justices, and the mother and her witnesses having been heard, seven witnesses were called for the defendant, and the justices dismissed the application "on the merits."

A second application having been made and a fresh summons issued, it came on for hearing on the 27th of March, 1867, when

the attorney for the defendant took the objection that the justices ought not to entertain the complaint, on the ground that the previous application had been heard and dismissed upon the merits. The justices determined to hear the complaint, on the ground (as the fact was) that one of the witnesses for the defendant on the former occasion (but for whose evidence, as one of the justices present on both occasions observed, an order would probably have been made), had been since convicted of perjury on the evidence he had then given. Upon this determination, the defendant's attorney protested against the justices' jurisdiction and retired; and the justices, after hearing the complainant and her corroborative evidence, made the order of affiliation complained of.

Griffits shewed cause. The justices clearly had jurisdiction, under 7 & 8 Vict. c. 101, ss. 2-3, to entertain the second application, and the order of affiliation is valid. In *Reg.* v. *Justices of Buckinghamshire* (1), Erle, J., in the Bail Court, expressed an opinion that a former decision on the merits in favour of the putative father would have been an answer to a second application: but in *Reg.* v. *Brisby* (2), an invalid order was held no bar to a second application, and in *Reg.* v. *Machen* (3), the Court, in a considered judgment, held that justices were bound to hear a second application after a previous dismissal on the merits; and in *Reg.* v. *Cook* (4), it was held that, at any rate, the justices had jurisdiction to hear a second application; and in the last case, Erle, J., himself remarks that the Court of Queen's Bench had decided that he was wrong in holding that in bastardy cases an inquiry on the merits made the matter res judicata. It is true that in *Reg.* v. *Machen* (5), the Court adds, "We are far from saying that the dismissal is to have no weight; but we think that the justices cannot refuse to hear the second application. If it should appear to them that the matter was fully inquired into on the first occasion, they will reasonably view any new evidence with much suspicion, and sift it accordingly, but we do not think that a dismissal can operate as a bar to further inquiry." In the present instance, the case, no doubt, on the first

(1) 18 L. J. (M.C.) 113; S. C. nom. *Reg.* v. *Robinson*, 6 D. & L. 295.

(2) 18 L. J. (M.C.) 157; 1 Den. C. C. 416.

(3) 14 Q. B. 74; 18 L. J. (M.C.) 213.

(4) 21 L.J. (M.C.) 136; 2 Den. C.C. 462.

(5) 14 Q. B. at p. 80; 18 L J. (M.C.) at p. 215.

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occasion, was fully inquired into, but when it turned out, from subsequent inquiry, that the principal evidence for the defendant was false, unless the previous dismissal was a bar (which *Reg.* v. *Machen* (1) shews clearly it is not), the justices could not do otherwise than rehear the case. The case of *Reg.* v. *Herrington* (2) will possibly be cited by the other side; but the dicta of the Court go no further than that in an ordinary case the previous decision ought to have so much weight given to it as to make it practically conclusive; but this is not an ordinary case, when the previous dismissal was brought about by perjured evidence.

McMahon, in support of the rule. The former decision in favour of the defendant was a decision beyond all question on the merits, and is a bar to a second application.

[BLACKBURN, J. Is it a conclusive legal bar?]

In *Slater's Case* (3) it was held that an original bastardy order could not be annulled by a subsequent order. The 8 Vict. c. 10, s. 2, which gives power to the mother to apply again when a former order has been quashed, distinguishes between quashing for want of form and on the merits; shewing that the legislature intended a decision on the merits to be final. In *Reg.* v. *Machen* (1) the first application was dismissed for want of corroborative evidence; and in *Reg.* v. *Herrington* (2) Cockburn, C.J., says he is disposed to agree with what was said in *Reg.* v. *Machen* (1), that a dismissal for want of corroborative evidence was not a decision on the merits, but is more in the nature of a nonsuit; and he goes on to say, that if there had been a hearing on the merits, and that were distinctly brought to the notice of the justices on the second occasion, that ought to be sufficient answer, as the doctrine of res judicata ought to apply to this as well as any other case. And Blackburn, J., also says, a dismissal on the merits ought to be treated as conclusive. In *Reg.* v. *Cook* (4), Pollock, C.B., assumes that a dismissal on the merits is conclusive, but says the justices would have jurisdiction to inquire whether the former hearing had gone into the merits. In *Reg.* v. *Brisby* (5), Patteson, J., says, "the

(1) 14 Q. B. 74; 18 L. J. (M.C.) 213.

(2) 3 N. R. 468; 12 W. R. 420.

(3) Cro. Car. 470.

(4) 21 L. J. (M.C.) 136; 2 Den. C. C. 462.

(5) 18 L. J. (M.C.) at p. 159; 1 Den. C. C. at p. 432.

order must be treated just as if the case had never been heard at all; but not the same as a case where the first justices refuse to make an order; for I am not prepared to say that where justices have heard all the evidence and refused to make an order, the woman can go before other justices and obtain an order." The conviction of one of the defendant's witnesses for perjury does not set the matter at large: Vin. Ab. tit. Perjury, (H.) 2, *Read's Case.*

BLACKBURN, J. I think this rule must be discharged. The ground on which the decision in *Reg.* v. *Machen* (1) went, was to apply to the present statute the principle of *Rex* v. *Jenkin* (2), that as no appeal was given to the parish authorities they ought not to be concluded, and an order adjudicating that the defendant is not the putative father was bad; and the Court say, "The statute, 7 & 8 Vict. c. 101, gives the mother the remedy, somewhat similar to that which formerly had been given to the parish. It authorizes justices, upon certain evidence, to adjudge the party summoned to be the putative father, and gives him a right of appeal; but it gives no direction as to what is to be done if the case is not made out to their satisfaction. Neither does the subsequent statute, 8 Vict. c. 10, which gives in a schedule the forms to be used; but there is no form of adjudication in favour of the party summoned, nor any enactment as to costs to him, or anything of the kind. We cannot therefore see that the legislature intended them to have any power to adjudicate finally against the mother." And no doubt if the statute had given the justices this power, whether on the merits or not, it would be res judicata. The Court however add, "We are far from saying that the dismissal is to have no weight; but we think the justices cannot refuse to hear the second application. If it should appear to them that the matter was fully inquired into on the first occasion, they will reasonably view any new evidence with much suspicion, and sift it accordingly; but we do not think that the dismissal can operate as a bar to further inquiry." Again, in *Reg.* v. *Herrington* (3), the Chief Justice and I both, I think, said

(1) 14 Q. B. at p. 79; 18 L. J. (M.C.) at p. 214.

(2) Ca. K. B. temp. Hard. 301.

(3) 12 W. R. 420; 3 N. R. 468.

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that the previous inquiry was no absolute bar, although the matter had been fully heard; but that the justices, on a second inquiry, ought to attach so much weight to the previous decision as to make it, in an ordinary case, practically conclusive. But, in the present case, one of the witnesses on whose evidence the former decision against the mother was obtained had since been convicted of perjury; but the attorney for the defendant chose to rely on the former decision as a bar, and would not enter into the merits. Under these circumstances the justices were quite right, when they found what had occurred on the former occasion, to proceed and adjudicate; and the only question on the present application is, whether they had jurisdiction, and they clearly had, and the rule must therefore be discharged. I only wish to be understood as saying, that, when the dismissal is upon the merits, the justices, on any subsequent application, ought to defer so much to the former decision as to treat the matter as res judicata, unless it be shewn that what may be called the first trial was, for some reason or other, not fair.

MELLOR, J. I am of the same opinion. I think the justices, on a second application, ought to give full effect and weight to the previous decision; but they are not bound, under all circumstances, to treat it as conclusive; and if, as in the present case, on the second occasion it has been shewn that the former dismissal was brought about by evidence which has since been established to be false, the justices have exercised a wise discretion in proceeding to hear and adjudicate, and the order is perfectly valid.

LUSH, J. The case of *Reg.* v. *Machen* (1) has long established that a dismissal of a bastardy summons is not conclusive on a second application. I confess but for that case I should have great doubts, nor do I quite see why, because there is no appeal, the decision should not be conclusive.

Rule discharged, with costs.

Attorneys for defendant: *W. J. Holt, for E. & A. Tennant, Hanley.*

Attorneys for justices: *Sharp & Ullithorne, for W. Allen, Leek.*

(1) 14 Q. B. 74; 18 L. J. (M.C.) 213.

[IN THE EXCHEQUER CHAMBER.]

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May 14.

HUBBERSTY *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Company—Transfer of Shares, Registration of—Calls Unpaid—Companies Clauses Consolidation Act (8 *Vict. c.* 16), *s.* 16.

94 BD 487

Section 16 of 8 Vict. c. 16, enacts that no shareholder shall be entitled to transfer any share after any call has been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him:—

Held, affirming the judgment of the Court of Queen's Bench, that the section only applies to the transfer of shares on which a call can be and has been made, and has no application to the transfer of shares on which all the calls have been paid; and a company therefore is bound to register a transfer of stock, although the transferror be the holder of shares on which there are calls unpaid.

ERROR on the judgment of the Court of Queen's Bench in favour of the plaintiff on a special case: ante, p. 59.

Manisty, Q.C. (*J. A. Russell* with him), for the defendants. The holder of shares and holder of stock stand on the same footing; each is a shareholder of the company, and the intention of the legislature was to give to the company, in the event of a call being made, a security on all shares the shareholder held in the company whether they are fully paid up or not; and the intention of the legislature would be defeated if, on a call being made, the shareholder were to be allowed to transfer his valuable shares and lessen the security, which the company have for the payment of the call.

Section 14 of 8 Vict. c. 16 permits the sale and transfer of shares, and s. 16, which enacts that "no shareholder shall be entitled to transfer any share, after any call has been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being, due on every share held by him," is a qualification on s. 14, and it prohibits the sale or transfer of any shares until the shareholder shall have paid all calls due on every share held by him. Then, is stock subject to the same restrictions as paid-up shares?

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HUBBERSTY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

[KELLY, C.B. The Court do not think it necessary to hear any argument on that point.]

Mellish, Q.C. (*Quain, Q.C.*, with him), for the plaintiff, was not heard.

KELLY, C.B. We are all of opinion that upon the true construction of this 16th section no condition is imposed upon the holder of stock, which the plaintiff has not complied with, and that consequently he was entitled to have the transfer registered.

We have only to look at the words of the section to see that no reasonable doubt can be entertained, that where the holder of shares desires to transfer shares upon which a call has been made, and is then overdue and unpaid, he cannot make the transfer until he shall have paid that call; and if it happen that at the time when the shareholder seeks to make the transfer, he has another class of shares in the same company on which a call has also been made and remains unpaid, he cannot make the transfer until not only the call in arrear in respect of the shares sought to be transferred has been paid, but he shall also have paid the calls on the other class of shares on which calls have been made and remain unpaid. If we look at the words of the section, such appears to be the necessary construction. The words are, "No shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call." Although the enactment does not stop there, let us assume that it had stopped there; what is the plain meaning of it? It contemplates a state of things in which a shareholder is the owner of shares upon which a call has been made, and at the time he seeks to make the transfer such call remains due and unpaid. The section goes on, "nor until he shall have paid all calls for the time being due upon every share held by him." But, before the liability to pay the one or the other can be imposed upon the shareholder as a condition upon which alone the transfer shall be made, it is clear that the words of the first part of the section must be brought into operation by the existence of a state of things to which they can be literally as well as substantially applied; that is, that in respect of the shares which the share-

holder seeks to transfer, a call has been made, which, at the time of the transfer, shall remain unpaid; it is a condition precedent to the right to refuse to register a transfer that, at the time the transfer is required, a call shall have been made and remain unpaid. I think, therefore, that we are all agreed that the judgment of the Court of Queen's Bench on this, the first and preliminary point, is in every way correct, and must be sustained.

If it were necessary to resort to the other question, it is, if possible, still less open to doubt. Speaking for myself, I must venture to express some doubt whether the payment on these 10*l.* shares can be properly termed a call; supposing it to be so, these 10*l.* shares, in respect of which the calls or payments of the purchase-money—by whatever name they be described—had been made, had been complete for a very considerable length of time, before any call had been made on the 25*l.* shares. It appears that these shares, the whole purchase-money having been paid up, were converted into stock—into a different description of property altogether, constituting of itself a portion of the capital stock or property of the company—and to say that a clause, expressed in language like this, can apply to that stock, and that the holder of stock is to be deemed to be the holder of shares, because stock is something into which what once were shares have been converted, and that a portion of that stock cannot be transferred until calls upon some other totally different and distinct classes of shares have been paid, appears to me not only contrary to the language, but contrary to the intent of the statute, and to every principle, whether of convenience or justice.

Under these circumstances, we think that upon both grounds the judgment of the Court of Queen's Bench was right, and must be affirmed.

I would add, that by the expression which I have used, "overdue," I must not be supposed to have expressed an opinion that if a call has been made upon two different descriptions of shares, though one or other of the calls may not be payable, the case might not be within the operation of s. 16; possibly whether the call were payable and so overdue or not, the clause would equally apply.

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HUBBERSTY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

WILLES, BYLES, MONTAGUE SMITH, JJ., and BRAMWELL and PIGOTT, BB., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Dubois & Maynard.*
Attorneys for defendants: *Cunliffe & Beaumont.*

May 14.

[IN THE EXCHEQUER CHAMBER.]

REYNOLDS *v.* BOWLEY AND ANOTHER.

Bankrupt—Bankrupt Law Consolidation Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 125 *—Goods in order and disposition of Bankrupt—Reputed Owner—Joint-tenants—Partners.*

Where one partner allows the other bonâ fide to carry on the business ostensibly as his own, on the bankruptcy of the latter the share of the dormant partner in the partnership stock in trade cannot be dealt with under s. 125 of 12 & 13 Vict. c. 106, as in the possession, order, or disposition of the bankrupt, as reputed owner, with the consent of the true owner.

ERROR on the judgment of the Court of Queen's Bench in favour of the defendants on a special case: ante, p. 41.

Macnamara, for the plaintiff.

H. James, for the defendants.

The arguments and the cases cited were the same as in the court below.

KELLY, C.B. We are invited by the emphatic language in which the Lord Chief Justice of the Queen's Bench has expressed himself in the court below to reconsider the decisions which have been pronounced bearing on this important subject, and to consider the case which is now before the Court on the true principles of the law, and upon the true construction of the 125th section of the Bankruptcy Act, 1849. In the observations that I am about to make on the several authorities which have been cited upon the meaning and general effect of s. 125, I believe that I am expressing the opinion of all of my learned brethren, with the exception of Mr. Justice Willes; and as he may desire to qualify in some respects the expressions I may use in the opinion I am about

to deliver, I will leave it to him to point out any distinctions which may arise between his own opinion and the law which I am about to lay down under the authority of the rest of the Court.

The question that is before us is, whether, in the case of a partnership, an honest and bonâ fide partnership, but one in which one of the partners is a dormant partner, goods, the property of the partnership, and which therefore must in one sense, no doubt, be held to be in the possession of the ostensible partner, shall, in the event of the ostensible partner becoming bankrupt, pass under s. 125 into the hands of his assignees, as goods which, by the consent and permission of the true owner thereof, he had had in his possession, order, or disposition. And I would express the opinion of this Court that a partnership in which there is a dormant partner, but which is carried on by an ostensible partner, is not within this section; that the possession which one partner holds of the goods, the property of the partnership, is not held by him by the consent and permission of any other person as "the true owner," in the sense in which those words are used. When we consider the intent of the statute, it is not to be denied that there may be cases of a partnership in which goods shall be in the possession and in the apparently exclusive ownership of the ostensible partner, so as to enable him to obtain credit by reason of his possession and apparently exclusive ownership, by which a body of creditors may be wronged and even defrauded, and in which such a possession may be entrusted to him by another member of the partnership under circumstances in which in equity the property ought to pass to the assignees of the bankrupt. It is not contended but that mischiefs may arise, which are contemplated and sought to be remedied by the statute, in cases in which there are dormant partners, as well as in all other cases and transactions which may be imagined between man and man. The question that we have to consider is, whether where there is a partnership with an ostensible partner and a dormant partner, it necessarily follows as a matter of law, on the construction of s. 125, that if the ostensible partner shall become bankrupt, the interest of the dormant partner in the goods, the property of the partnership, and by means of which the partnership was carried on, shall pass to the assignees of the bankrupt.

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In the first place it is impossible to look at the facts of the case now before us without seeing that, if such be the law, if in all cases of partnership in which one of the partners is a dormant partner this consequence is to follow, the greatest possible injustice may be done. Here is the case of a woman, who, together with her brother, invests the little fortune which she possesses in the purchase and stocking of a farm. She agrees that it shall be carried on in the most natural and convenient mode, by her brother the male member of the family; though she herself resides in the house and takes part in the management of the business, it is carried on in his name alone. This business, an honest and fair undertaking, is carried on by those two persons for a period of more than three years, from April, 1861, until December, 1864; and because the ostensible partner runs away, and so commits an act of bankruptcy, it is contended that under this provision of s. 125, the whole property which this woman was possessed of must cease to be treated as hers, and pass under this clause to the assignees of her brother, the bankrupt. It is impossible not to see that, if such be the effect of this section, it may in some cases, as it most undoubtedly would in this, work the greatest and most obvious injustice. Still the question is, whether, looking to the decisions on the subject, and with still greater and more minute attention to the words of the section, we are called upon on this, the first occasion, so far as I know, in which this important question has been brought under the consideration of a court of error, to hold that, as a general rule of law, a partnership in which there is a dormant partner is within the provisions of this enactment. Upon that point we have unquestionably what cannot be doubted to be the very high, if not the highest, authority of Lord Eldon, in the case of *Ex parte Dyster* (1), in which it should seem that that learned judge was of opinion that a partnership in which there is a dormant partner is in general within the provisions similar to this section. The same appears undoubtedly to have been the opinion of some of the judges of the Queen's Bench, whose opinion and authority are entitled to great weight, in the case of *Ex parte Enderby*. (2) That again was followed by the case of *Smith* v.

(1) 2 Rose, 256. (2) 2 B. & C. 389.

Watson. (1) And it cannot be denied that judges of great learning, and the very highest eminence, have entertained and pronounced an opinion which is at variance with that which this Court is about to deliver. We have in addition that which I ought not to fail to advert to, the concluding words in the section, in which, after the enactment on which this case depends, it is said, "provided that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel made as a security for any debt or debts by way of mortgage or assignment duly registered." It certainly may be argued that in that provision an indirect sanction is given to the several decisions to which I have adverted; but I think, when we consider the language of the section, it was meant to apply, not to the case of partnerships in which there was a dormant partner, but to the case of the joint or part ownership of a British vessel, with reference to the Registration Act. It appears to me to be merely a provision having reference to what had been decided in a great variety of cases; and whatever might be the effect of these decisions, whether they would apply to cases where there was a dormant partner, or to cases in which there was a part ownership of British vessels, that, at all events, the ownership of British vessels should not be embarrassed and fettered with any provisions of this nature, and that the owners of British vessels registered under that act should be taken from within the operation of the Bankruptcy Act, even supposing they were within those provisions before. It was a provision ex majore cautelâ, and one which neither directly nor indirectly confers the authority of the legislature on the decisions I have referred to.

Then when we look to the other side of the question, we find that the opinions in favour of the construction of the act which the majority of the Court are disposed to place on it are opinions entitled to the greatest weight in every Court in Westminster Hall. We have, first, the very high authority of Lord Redesdale, some time Lord Chancellor of Ireland, in the case of *Joy* v. *Campbell* (2); and it is impossible to read the language he uses without seeing that he entertained the opinion that a partnership having a dormant partner was not at all within the operation of this enactment. Then

(1) 2 B. & C. 401.

(2) 1 Sch. & Lef. at p. 336.

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we have the case of *Coldwell* v. *Gregory* (1), which is a decision of the Court of Exchequer; and I agree with what has fallen from Mr. James that the facts of that case did not necessitate the decision that was pronounced. The same may be said of every case on the subject. There is no one case on the one side or the other in which, if we had to compare the precise facts of each particular case with the facts now before the Court, we might not point out a great distinction. Considering that we are now called on as a court of error to decide this question, I would rather not base our judgment on any nice or refined distinctions, which might rather tend to create confusion in the law than to relieve the law from any of the uncertainty which has hitherto accompanied the decisions on this subject. We have the case of *Coldwell* v. *Gregory* (1), in which the opinions of the judges of the Exchequer of that day are clear upon the point, that the consent given or implied by a dormant partner to the possession of the property by an ostensible partner is not such a consent as comes within provisions like those of this section, and as will pass the property to the assignees of the ostensible partner in the event of his becoming a bankrupt. We have besides that not a direct decision, but the high and clear authority of Parke, B., in delivering the judgment of the Court of Exchequer in *Load* v. *Green* (2), where the proposition is clearly pointed out which I think lies at the very root of this question, and is fatal to the argument urged for the defendants, viz. that the apparent owner must be one person, the true owner be another person. We have high authorities on the one side, and on the other, and if we were to attempt to weigh the one class of cases against the other, it would not be for me to say on which side the scale would preponderate. But it seems to me that, looking to the state of the law on this subject, seeing that during the last sixty or seventy years there have been, if not conflicting decisions, conflicting opinions pronounced on this very important question, we are now called upon to look to the words of the statute itself, and put such a construction on it as we think it ought to have independently of all authority. [The Lord Chief Baron read the section.] The question that arises is this—Had the bankrupt, when he had possession as an ostensible partner

(1) 1 Price, 119. (2) 15 M. & W. at p. 223.

in a copartnership in which there is also a dormant partner, possession of the partnership effects by the consent and permission of the true owner? Now, if, as Parke, B., observes, the reputed owner who has the actual possession must be one person, and the true owner must be another, if in truth the goods must belong to one person, and the true owner of those goods of his own free will and consent permit another, not the owner, to appear to the world as the reputed owner of them, how can the answer be in the affirmative? We find here that the words are "by consent and permission of the true owner has in his possession, order, or disposition." The bankrupt was the true owner himself; he was as much the true owner of these goods as the plaintiff was, and when we come to look at the actual facts, and the legal effect of them, we find that he had possession of those goods, not by the consent of any other person, or by the consent of the plaintiff, but in his own right, and by virtue of a contract, to which, indeed, the plaintiff was a party, and to which the bankrupt also was a party, and which vested in him exactly the same description of ownership, or joint ownership, that the plaintiff herself possessed. The language of the statute seems to point to this, a state of things in which the owner of the property allows the property to remain in the possession of another person, so that the other person appears to be the owner, although not himself the true owner. But it also implies a power in the true owner to resume his rights, to resume possession of the property of which he is the owner, to take it out of the possession of the person to whom he may have entrusted it, and which, therefore, shews that he is the true owner, and the other person only the apparent owner. Whereas, look at the case existing here; this is the case of a partnership which commenced some years before the time when the bankruptcy occurred. If the plaintiff, who was the joint owner of this property together with the bankrupt and who only permitted it to be in possession of the bankrupt by virtue of an ordinary partnership deed, had desired at any time to prevent these goods passing into the hands of her brother, in case he became bankrupt, she had no power to do so. Nothing can be held by one person with the consent of another which the other has no power by law, from the nature of the con-

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tract, to interfere with, or take possession of. Looking to the language of this statute, it appears to me that the bankrupt held these goods in his own right; he had been the joint owner of them together with another person for more than three years before the bankruptcy, he was carrying on business by means of those and other partnership effects, and was possessed of them under a perfectly honest and lawful contract of partnership entirely in his own right. His possession could no more be disturbed by the person who is said to be the true owner of them, than her possession could have been disturbed by him. It seems to me that the statute cannot apply to a case in which there is a joint ownership, even without a joint possession, where there is a joint ownership under a clear and bonâ fide contract of copartnership in which no other consent is given by the dormant partner to the possession of the ostensible partner than that which results from the contract of partnership, which, therefore, clothes both of the parties with an equal and joint right of possession, and which neither party is at liberty by law to disturb.

I am aware there are cases where there has been a bill of sale, in which a person may hold goods under a contract, and by the terms of the contract it is not competent to the true owner to disturb the possession, as where goods have been mortgaged, and yet allowed to remain in the possession of the mortgagor under one of the terms of the deed. It is possible that the statute may well apply to cases of that nature. There, though the assent of the true owner to the possession by the apparent owner is given through the medium of a contract, yet the fact still remains that the apparent owner is not the true owner; he only holds possession by the consent of the true owner, given by the contract.

I think, therefore, under the circumstances, this case, considering it first with reference to the true intent of the statutes of bankruptcy, above all, with reference to the clear and express language of this statute, is neither within the mischief sought to be remedied by this statute, nor is it within the plain and express words of the statute. I believe I am expressing the opinion of the whole of my learned brethren, as well as that of my learned Brother Pigott (1), who heard a great part of the argument, that the case of the part-

(1) Pigott, B., had gone to chambers before the argument concluded.

nership in question is not within the operation of this section of the act; and that the judgment of the Court of Queen's Bench must, therefore, be reversed.

WILLES, J. I am of the same opinion. I do not venture to dissent from the judgment which has been delivered by the Lord Chief Baron; but, according to my notion of the case, it is quite unnecessary to consider it in the view in which he has presented it. I wish to say that I never before heard it suggested that the cases which have been relied on are applicable to a case where the partners are in joint possession, and both together carry on the business, without concealment beyond the mere circumstance of the firm bearing the name of one of the partners only, or, it may be, bearing a name which belongs to neither in particular. I am clearly of opinion, in accordance with the conclusions of the Lord Chief Baron, that the fact of a business being carried on in the name of one ostensible partner does not necessarily make a reputed ownership in the partner whose name is used. Such a partner may or may not be—I think in this case he was not—a reputed owner. But assuming there was reputed ownership, of which I am not satisfied, I am satisfied that in this case the bankrupt had not the "possession, order, or disposition," in the only sense in which those words are material, that is to say, the sole possession, order, or disposition, as owner. The statement of facts, if carefully considered, shews that the brother was not alone the farmer; that both brother and sister carried on the farm. She, in fact, allowed him to have the complete control, and limited her interference to assisting him; she was there as his assistant, not in the capacity of his mere servant; she received a profit made on the spot, as the produce of her own property; during his stay, she was joint proprietor in possession; while he was away, she was sole mistress. Without overruling any case, it appears to me, upon the facts, that this is not a case in accordance with any authority referred to within the reputed ownership section of the Bankrupt Acts, and that therefore the plaintiff is entitled to her share of the property.

BRAMWELL, B. Without differing from anything said by the

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Lord Chief Baron, I prefer to put my judgment on the ground stated by my Brother Willes.

BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred in the judgment of the Lord Chief Baron.

Judgment reversed.

Attorney for plaintiff: *Crowdy.*

Attorneys for defendants: *Few & Co.*

April 27.

THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF LINCOLN, APPELLANTS; THE OVERSEERS OF THE EXTRA PAROCHIAL PLACE OF HOLMES COMMON, RESPONDENTS.

Poor Rate—Occupation—Occupation of Land subject to Profit à prendre—Municipal Corporation and Freemen.

Por 493, 503
4 Q.B. 25
281-4
7 Q.B.D. 250

The soil of a common is vested in the municipal corporation of L., as lords of the manor, and each of the freemen, if resident within L., is entitled, as a personal privilege, to turn, at all times, on the common two head of cattle. The corporation repair the fences of the common, and preserve the rights of the freemen from being infringed; they appoint and pay out of the corporate funds a commons warden to check illegal stocking, and to inflict fines on those who illegally put in stock; part of the fines are paid to the corporate funds, and part to the commons warden; the corporation derive no benefit whatever from the common, but are losers by appointing and paying the commons warden:—

Held, that the corporation were not rateable to the poor rate in respect of the common, as, although they were owners and occupiers, it was subject to a profit à prendre in the freemen which exhausted the whole value of the occupation.

CASE stated, under 12 & 13 Vict. c. 45, on appeal to the quarter sessions, by the Mayor, Aldermen, and Burgesses of the City of Lincoln, against a poor rate for the extra-parochial place of Holmes Common.

The mayor, aldermen, and citizens of Lincoln are lords of the manor of the city of Lincoln. Within the precincts of the city there is a commonable pasture, called the Holmes Common, which prior to 1849 consisted of about fifty-eight acres of land, or thereabouts, but which now contains about thirty acres of land, over which the freemen of the city have certain rights of pasturage, the soil being vested in the corporation as lords of the manor. There are about 550 freemen in the city of Lincoln, who are all entitled

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to stock the common with two head of cattle, if they are resident within the city; but, to entitle them to stock the common, they must be actually resident therein. The freedom of the city can only be obtained by birth and servitude—that is to say, a man must be the son of a freeman, or must be bound by indenture of apprenticeship for seven years to a freeman, before he is entitled to be entered and registered as a freeman.

The corporation have always maintained and repaired, out of their corporate funds, the fences of the common, and they also preserve the rights of the freemen from being infringed. The corporation have exercised manorial rights over the common, such as appointing and paying out of their corporate funds an officer, called the commons warden, to check the illegal stocking thereof, inflicting fines upon those persons who have illegally stocked; part of such fines has been invariably paid into the corporate funds, the other part is paid to the commons warden, the person appointed by the corporation. The commons warden has, about once in four years, driven the common, for the purpose of ascertaining whether there was any stock upon it belonging to persons not resident freemen, and not entitled to stock the same; upon driving the common, a fine or toll of twopence per head has been levied for the trouble and expenses of driving the common, as men have to be hired to assist in driving the stock off the common, and keeping it until claimed by the owner.

Over the Holmes Common the resident freemen have enjoyed, by prescription, for a long period of time, a perpetual right of depasturing all the year round two head, and no more, of cattle, horses, or beasts. They cannot let or transfer their common right, or authorize another person to stock in respect of it; they have only the right to depasture cattle that are bonâ fide their own. This right ceases with their death, and does not go to their widows or children; it is entirely a personal privilege. If a freeman has no stock, his right is in abeyance; and such of the resident freemen avail themselves of the right to depasture, at their option, as are in a position to do so. Previous to the passing of the Municipal Corporation Act, the corporation consisted of freemen only; no one could then be a member of the corporation who was not an admitted freeman.

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All the freemen alike were, and still are, entitled to this commonable right, without any distinction as to standing or position in life—the richest freeman precisely the same as the poorest. It was never, in any respect, a charity.

No act of parliament, charter, or written document of any kind, regulated the right of the freemen up to the passing of the Municipal Corporation Act, in 1835. These rights, whatever they may be, entirely depended, up to that time, upon usage and prescription. Section 2 of the Municipal Corporation Act (5 & 6 Wm. 4, c. 76) reserves to all freemen of cities and boroughs all rights relative to property to which they were then entitled, and which property (subject to such rights) was then vested in the corporate bodies of such cities and boroughs, and of which such corporate bodies were seised or possessed in whole or in part for any charitable uses or trusts, as fully and effectually for such time and in such manner as he or she, by any statute, charter, bye law, or custom, in force at the time of passing this act, might or could have had, acquired, or enjoyed, in case this act had not been passed. This proviso gave no new rights to the freemen, but reserved to them their existing rights merely.

The corporation have not received, or had any benefit, or derived any income whatever from the Holmes Common except the fines already mentioned.

In the year 1849, the Great Northern Railway Company took for the purpose of their railway under their act of parliament 28a. 0r. 37p. of land, part of the Holmes Common, for which they paid into the Court of Chancery, to the credit of *Ex parte the Great Northern Railway Company*, to the account of the mayor, aldermen, and citizens of the city of Lincoln the sum of 8471*l.* 7*s.* 6*d.*, being at the rate of 300*l.* per acre. The Court of Chancery subsequently settled a scheme for the appropriation of the whole of the above purchase-money, which was invested in bank annuities, and the same money under the scheme now stands in the name of the Accountant General to the credit of a matter entitled *Ex parte the Mayor, Aldermen, and Citizens of the City of Lincoln*, to an account entitled "The Senior Freemen's Fund," and the dividends and annual proceeds are paid, according to the scheme, to certain of the poor freemen of the city.

The corporation have not occupied the common by depasturing any stock, or horses, or otherwise, nor do they claim any right to occupy or depasture stock thereon, but the right to stock belongs to the individual freemen who stock it and consume the herbage, and receive the benefit therefrom.

The corporation do not claim any rights as lords of the manor, or in any other capacity to stock the common, nor have any of the members of the corporation as members of that body ever stocked the common. The fines received from the illegal stocking of Holmes Common do not on an average amount to 5*s.* in the year, and does not cover the costs of the salaries and repairs. The corporation is an absolute loser by appointing and paying a commons warden to protect the stocking of the common and the maintenance of the fences.

Previous to the Municipal Corporation Act, the two sheriffs of the city of Lincoln used to drive the common, and inflict fines for the illegal stocking, and no commons warden was ever appointed; but since the passing of that act, the corporation appointed a commons warden over the Holmes and other commons of the city for the purpose solely of preventing the illegal stocking, and to maintain and keep the fences in a proper state.

By the 4 & 5 Vict. c. 48, it was enacted that the municipal corporations mentioned in the schedule should from and after the passing of that act be rateable to the relief of the poor in respect of lands, tenements, and hereditaments being the property of, and in the occupation of such municipal corporations, as if such lands, tenements, and hereditaments were not corporate property; and it was further enacted, that any of the said municipal corporations being in the occupation of such lands, tenements, and hereditaments as were thereinbefore described, should be deemed and taken to be beneficial occupiers thereof for all the purposes of rating as if such occupation was for their own private advantage, and not for any public purpose, and should be liable to be rated as such occupiers by their corporate style and title.

The corporation contend that the above act in no way makes them responsible or liable to be rated to the relief of the poor of Holmes Common. They allege that they are not the occupiers or

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owners, nor have they the beneficial occupation, nor have they any interest in the common except as lords of the manor of the city of Lincoln, nor can they be deemed or taken to be the beneficial occupiers thereof, but that act had reference only to estates of which they were beneficial owners, and entitled to the rents and profits thereof, or to the occupation thereof for the benefit of their corporation funds.

Holmes Common having been, previously to 20 Vict. c. 19, an extra-parochial place, on the 30th of January, 1866, the respondents, as overseers, pursuant to that act, made a rate of 6*d.* in the pound for the relief of the poor in the extra-parochial parish, and assessed the appellants as the occupiers of Holmes Common on an assessment of 108*l.*, in the sum of 2*l.* 14*s.*

No persons other than the freemen have depastured or enjoyed any rights on Holmes Common.

There are no poor chargeable to the parish of Holmes Common, but the rate is made for union and common fund purposes.

The questions for the opinion of the Court were, whether the appellants are liable to be rated to the relief of the poor of Holmes Common as occupiers thereof; and if they are so liable, whether the rate ought not to have been reduced to nothing on appeal.

Hayes, Serjt. (*Wills* with him), for the respondents. The authorities shew that if the corporation are owners of the soil, and manage the land, they are liable to be rated. It is true that in *Rex* v. *Watson* (1), the burgesses were rated, but in *Rex* v. *Mayor of Sudbury* (2) that case is distinguished on the ground that it did not appear that the corporation did any acts upon the land, and the temporary ownership had been given up to the burgesses, who were rated. In *Rex* v. *Mayor of Sudbury* (2), it was held that the corporation were rateable as occupiers, and as the persons who had the management of the land; and this decision was founded on *Rex* v. *Tewkesbury.* (3) In *Rex* v. *Churchill* (4), the burgesses

(1) 5 East, 480.
(2) 1 B. & C. 389.
(3) 13 East, 155.
(4) 4 B. & C. 750.

were held not rateable, as they had a mere privilege of turning cattle on the common. *Rex* v. *York* (1) is precisely in point. The freemen of York, occupiers of houses in Monk Ward, were entitled to common of pasture over certain lands of which certain persons were lords of the manor. By an enclosure act the lands were enclosed, and portions of them allotted to the corporation in fee, to be exclusively enjoyed by the freemen occupiers of Monk Ward, in lieu of their right of pasture, which was abolished; so that the corporation were the owners and occupiers of the land, and the freemen had a right of pasture, which is precisely the case here, and it was held that the corporation were rateable. Since the passing of the 5 & 6 Wm. 4, c. 76, the freemen are no longer members of the corporation, but the effect of s. 2 is to make the corporation trustees for the freemen, and they are liable to be rated: *Jones* v. *Mersey Docks and Harbour Board.* (2)

Mellish, Q.C. (*J. J. Aston* with him), for the appellants. The freemen have a right of common adverse to the corporation, which exhausts the profit of the land; the occupation of the corporation is therefore of no benefit to them, and they are not rateable. This case is not governed by *Jones* v. *Mersey Docks and Harbour Board.* (2) That case decided, that if the occupier receives a profit, it matters not for whose benefit he receives it, he is rateable because he can deduct the amount of the rate before he pays it over to the person entitled to it. That case also laid down that there is no distinction between property held on private or public trusts. Here, however, it can in no way be said that there is any beneficial occupation by the corporation, for they cannot at law derive any profit from the land. And, moreover, there are no funds but the city funds out of which the rate can be paid. A right of common is not rateable. This case is analogous to the case of a right of shooting, which, when separated from the ownership of the soil, has been held not to be rateable: *Hilton* v. *Bowes.* (3) Before the passing of the 5 & 6 Wm. 4, c. 76, the freemen were part of the corporation, but now they have ceased to be so; but all the corporate benefit to

(1) 6 A. & E. 419.
(2) 11 H. L. C. 443; 35 L. J. (M.C.) 1.
(3) Law Rep. 1 Q. B. 359.

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which they were entitled is reserved to them by s. 2, and each freeman has a right, which he can enforce by law. *Rex* v. *Mayor of York* (1) is distinguishable. That case was decided before the passing of the 5 & 6 Wm. 4, c. 76; and the freemen, as members of the corporation, enjoyed the land, and the corporation, therefore, were liable to be rated. Besides, in that case the corporation were trustees for the freemen. The freemen also paid a sum of money for putting the cattle on the land, varying from 10*s.* to 15*s.*; there was, therefore, a fund from which the rate could be paid. If the corporation enjoy the profit of the land they ought to be rated; but if the freemen have rights in gross over the land, the occupation is diminished by the amount of the value of those rights, and if so, the case clearly comes within those cases which decide that the occupier is not liable to be rated in respect of rights in gross held by others over his land. *Rex* v. *Tewkesbury* (2) is the simple case of land vested in trustees, in trust to let it and divide the rents amongst the burgesses. The argument was, that they were trustees for a public trust, and therefore not rateable; but the Court held otherwise. In *Rex* v. *Sudbury* (3) the corporation were seised of certain land, which was depastured by the cattle of the burgesses, and they were entitled to charge each burgess who put cattle on it a certain sum, which was divided amongst those burgesses who did not put on cattle. In *Rex* v. *Watson* (4), the corporation being seised in fee of land, it was let out to certain of the burgesses, who paid a certain sum to those who did not turn out cattle, the Court held that the burgesses had a corporeal tenement, and were liable to be rated. It is to be observed that these cases, as well as the others cited by the respondents, were decided before the passing of the 5 & 6 Wm. 4, c. 76.

Hayes, Serjt., was heard in reply.

COCKBURN, C.J. There are two questions for our decision. First, are the corporation of Lincoln liable to be rated in respect of the occupation of the land; and secondly, supposing they are liable to be rated, is the value such as that there should

(1) 6 A. & E. 419.
(2) 13 East, 155.
(3) 1 B. & C. 389.
(4) 5 East, 480.

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be a substantial rating, or ought the rate to be reduced to nothing?

I am of opinion that the corporation are not liable to be rated. I think we can distinguish this case from *Rex* v. *Mayor of York* (1), and the other cases which preceded it, by referring to the complete alteration which the Municipal Corporation Act has introduced in the position of the freemen relatively to the corporation. In those cases the freemen were an integral part of the corporation: or rather I should say, they were the corporation. Since the Municipal Corporation Act the freemen have been entirely detached from the corporate body. They are now no longer a part of the municipal corporation, and therefore do not stand to the corporation in the relation in which the freemen did when these cases were decided. The corporation of Lincoln, as constituted under the Municipal Corporation Act, have vested in them whatever lands were vested in the corporation as that body existed before, and therefore they are the owners and occupiers of the soil; but then they are the owners and occupiers, subject to the right which the freemen and their descendants have to depasture certain cattle on those lands; and it appears that the enjoyment which the freemen and their descendants have in respect of the right of pasture on those lands exhausts what may be called the profit of the land. There is nothing left for the benefit of the corporation; they have no beneficial interest whatever in the land. It has, however, been said that they may be considered as trustees, for the benefit of the freemen; and that, therefore, the occupation being beneficial, so far as the freemen are concerned, the corporation are liable to be rated. I think the answer to that is, that they occupy subject to the rights of the freemen. They cannot be said to stand in the position of trustees, and the freemen in the position of cestui que trust; and even if they could stand in that position, Mr. Mellish is right in saying that the case does not come within the principle laid down by the House of Lords in *Jones* v. *Mersey Docks and Harbour Board*. (2) The decision in that case establishes that persons who are trustees for others, and hand over to them the profits, are themselves owners and occupiers, and therefore primâ facie are liable to be

(1) 6 A. & E. 419.
(2) 11 H. L. C. 443; 35 L. J. (M.C.) 1, 11 Jur. N.S. 746

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rated; and the decision even goes the length of saying that, notwithstanding the persons rated derive no profit whatever, they are liable to be rated, because they can stop the amount of the rate out of the profits before they are handed over to those who are entitled. That principle cannot be applied to this case. The corporation receive nothing either for themselves or for anybody else. Nothing passes through their hands; and if they were to be assessed to this rate they would have to pay the rate out of the borough fund, a fund which is not raised for the purpose of paying an expenditure like this, but for the purpose of paying general expenses. The case, therefore, stands simply thus: the corporation are owners and occupiers of the common, subject to a profit à prendre, which exhausts the whole value of the land, and leaves no beneficial value to the occupation of those persons who are owners and occupiers; therefore I think, according to the principle which is still law, notwithstanding the decision of *Jones* v. *Mersey Docks and Harbour Board* (1), the corporation are not liable to be rated.

BLACKBURN, J. I am of opinion that the rate should be reduced to nothing, which is substantially the question the parties desire to have decided. The general rule is that established by the Parochial Assessment Act, that the rate which is to be levied on the occupier is to be calculated upon the amount of the rent which would be got from an hypothetical tenant from year to year. *Jones* v. *Mersey Docks and Harbour Board* (1) decided, that where the occupation is such that it does produce profit, it is immaterial whether the rent is paid to a person to his own use, or is paid over by him to a charity, or to a cestui que trust, or any one else: but in order that there should be a rate there must be a rent; and if the hypothetical tenant would pay nothing for the occupation, there can be no rate. I think in this case the corporation are the occupiers of this land: they are the persons who have the control over it, and who appoint the servants to look after it. Although they are the persons in the occupation of the land, yet the actual benefit derived from the land belongs to the freemen of the corporation. Now, if the corporation, in letting to an hypothetical tenant, are to be considered to let to him their occupation with the

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

right of pasture, doubtless they would obtain a rent for it, but if all that they have to let to the hypothetical tenant is the occupation of the land, subject to the right of the freemen to take the pasture by the mouths of their cattle, then it is plain enough that the hypothetical tenant would not give a farthing for it, but probably would require to be paid for the burthen he took, and consequently there would be no rent upon which a rate could be assessed. The question then is, what is the nature of the right the freemen have; is it such that the hypothetical tenant would find the occupation a burthen instead of a profit? Before the Municipal Corporation Act, when the freemen were members of the corporation, the occupation was in fact the beneficial occupation of the body corporate, and accordingly the hypothetical tenant, coming in the place of the corporation, would have enjoyed the rights of the freemen and had the profits of the land, but since that act the freemen are not now members of the corporation, but each of them has the right to put two cattle on the common, and that right must be considered in the nature of a right of common in gross. I think, therefore, that the hypothetical tenant must be taken to come into occupation of the land subject to that right. If ever the number of freemen were reduced, so that the aggregate number of cattle they would be entitled to turn on the common would not eat up all the grass, then I think the corporation might be able to get a rent from the hypothetical tenant. But at present there are 550 freemen, each of whom can put two cattle on the common, which consists only of thirty acres, and it is found as a fact that the cattle do eat up the whole of the pasture so that there is nothing left, and as long as that state of things continues the hypothetical tenant would pay no rent. It is, therefore, a mere question of words whether we say that the rate shall be reduced to nothing, or that the corporation are not rateable.

SHEE, J. I am of the same opinion. The freemen in this case seem to me not to be tenants in occupation of land, they have only an incorporeal right, the right of turning the cattle on it. The corporation are in occupation of the land, but it is an occupation from which they derive no profit, the whole of the

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profit being taken by those who have the right in gross to put cattle on the land. On this ground the rate must be reduced to nothing.

Judgment for the appellants. (1)

Attorneys for appellants: *Swann & Tweed.*
Attorneys for respondents: *Rogerson & Ford.*

(1) See the two following cases.

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXX VICTORIA.

THE QUEEN, on the Prosecution of GOODYER and Another, Appellants; *v.* THE INHABITANTS OF THE PARISH OF ST. MARTIN'S, LEICESTER, Respondents. 1867 *June* 13.

THE QUEEN, on the Prosecution of the JUSTICES OF LEICESTERSHIRE, Appellants; *v.* THE INHABITANTS OF THE TOWNSHIP OF CASTLE VIEW, LEICESTER, Respondents.

Poor-rate—Exemption of the Crown—Exemption of Buildings used for Government Purposes—Buildings occupied for Police Purposes, Assize Courts, &c.— 43 *Eliz.* c. 2, *s.* 1.

The chief constable and an inspector of the L. county police were rated to the poor-rate in respect of dwelling houses, &c., which they severally occupied, and were required to occupy, in discharge of their respective duties, together with magistrates' room and other accommodation necessary for the purposes of police. The county constabulary were established under 2 & 3 Vict. c. 93, and are inspected annually by a government officer, and, if the report is satisfactory, a grant is made by the Treasury in aid of the police rate:—

Held, that the decision of the House of Lords in the *Mersey Docks Cases* (11 H. L. C. 443; 35 L. J. (M.C.) 1) had left untouched the principle on which buildings used for public government purposes were exempt from rateability, as being occupied for the purposes of the Crown, and so not within 43 Eliz. c. 2, s. 1,

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the Crown not being named in the act; and that the premises in question came within this principle of exemption.

The justices of the county of L. were rated to the poor rate in respect of the "Castle," which comprised buildings used to keep the records of the county, as courts at the assizes and quarter sessions, judges' lodgings, &c. The "Castle" is crown property, and was granted by letters patent to the "constable," or his deputy, on condition that he should permit the above uses to be made of the buildings. The deputy constable, who was also deputy clerk of the peace, had a set of keys, and another set was kept by a "keeper," appointed by the justices and paid an annual salary by them. The justices had expended large sums in repairing and enlarging the buildings. They made no further use of them; but the buildings were also used for the sheriff, county, and revising barrister's courts, and for various public meetings, &c.:—

Held, that the justices had no such occupation as rendered them liable to be rated.

Quære, whether the "Castle," under the circumstances, was rateable at all?

THE QUEEN *v.* ST. MARTIN'S.

ON two separate appeals against a poor-rate for the parish of St. Martin's, Leicester, the sessions quashed the rate, subject to the following case:—

The appellant, Mr. Goodyer, was rated in the sum of 80*l.* in respect of the annual value of a house and buildings in the parish in his occupation.

The appellant, Henry Bail, was rated in the sum of 150*l.* in respect of the annual value of a house and buildings in the same parish in his occupation.

As the question in both appeals was identical, it was agreed by counsel that the cases should be consolidated.

The property in the occupation of the two appellants comprises the buildings and offices provided for the police purposes of the Leicester district of the county of Leicester.

The county constabulary for the county of Leicester was established under the 2 & 3 Vict. c. 93. The county was divided into police districts and station houses, and strong rooms have been built and provided under 3 & 4 Vict. c. 88.

That part of the property in Mr. Goodyer's occupation consists of a dwelling house and buildings, and comprises the following rooms and offices:—3 sitting rooms, 4 bedrooms, 2 kitchens (one underground), 1 store room or pantry, 1 room for records, &c., 1 office for chief constable, 1 ditto for clerk, vestibule, 1 small room for sergeants, 1 room (underground) for police stores.

The appellant, Mr. Goodyer, is chief constable of the county, and the house and premises are in his occupation in that capacity. He receives a salary of 450*l.* a year, and has the house *rent free*. The magistrates make it a condition of the appointment that he shall reside there. It may be assumed that the house is not larger or more commodious than is necessary for the use of a person filling the office held by the appellant. The furniture belongs to the appellant. He is married, and his wife resides with him.

The appellant, Henry Bail, is inspector of the police. The premises, in respect of which he is rated, consists of a house and buildings, comprising the following rooms and offices:—5 underground kitchens, 1 sitting room, 1 office, 4 cells, 3 bedrooms, 1 magistrates' room, 1 retiring room, 1 witnesses' room, and room for stamping weights and measures.

Bail, the appellant, receives a salary of , and is required to reside in the house. It is not larger or more commodious than is necessary for his convenient accommodation. He is married, and his wife and family reside with him. The furniture of the house belongs to him; the fittings and requisites for the rest of the buildings are provided by the magistrates.

No part of the property, as at present used, has been previously rated, or, if rated, the rate has not been paid.

If the premises, or any part thereof, are liable to be rated, the rate will have to be paid out of the police rate.

The police of the county of Leicester are inspected annually by a government officer, who reports as to the state and efficiency of the force. If the report is satisfactory, a grant is made by the Treasury in aid of the police rate; but the grant is not compulsory, and may be made or withheld, at the discretion of the government.

The question for the opinion of the Court was, whether the premises in the several occupations of the appellants, or any and what part or parts thereof, are liable to be rated for the relief of the poor.

June 12. *Merewether*, and *W. J. E. Bennett*, for the appellants. Buildings occupied for the purposes of police, are clearly within

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the well established exemption from rateability, as occupied for public government purposes. *The Justices of Lancashire* v. *Stretford* (1) is not distinguishable from the present case as to the police offices, &c.; and where officers are required to reside on particular premises for the discharge of their duties, their dwelling houses also come within the same exemption: *Reg.* v. *Shepherd.* (2) This exemption is left untouched by the *Mersey Docks Cases.* (3) Blackburn, J., in delivering the opinion of the majority of the judges, expressly recognises, inter alia, premises occupied for the purpose of the local police, as properly falling within the exemption, not as being occupied, strictly speaking, by the servants of the sovereign, so as to make the occupation that of the queen; but as used for purposes of that kind, which by the constitution of the country fall within the province of the government which is committed to the sovereign. And Lord Cranworth takes precisely the same view.

Keane, Q.C., and *J. E. Hall*, for the respondents. The *Mersey Docks Cases* (3) decide that a person found in the occupation of property capable of a beneficial occupation is primâ facie rateable; and that the only exemption is when the Crown is in occupation directly by its servants, or indirectly, where the purpose of the occupation is such as to amount to an occupation by government servants for public government purposes; the present case falls within the principle of the cases of *Reg.* v. *Wallingford Union* (4), and *Governors of Bristol Poor* v. *Wait.* (5)

[COCKBURN, C.J. As being for a local though otherwise public purpose, and not strictly a government purpose?]

Yes: and that is precisely where the line is drawn in the *Mersey Docks Cases* (6), in which Lord Cranworth, when alluding to the decisions in which the exemption had been allowed, says: "They have all gone on the ground, more or less sound, that these might be treated as buildings occupied by the servants of the Crown and for the Crown, extending in some instances the shield of the Crown

(1) E. B. & E. 225, 230; 27 L. J. (M.C.) 209, 211.
(2) 1 Q. B. 170.
(3) 11 H. L. C. 443, 464, 508; 35 L. J. (M.C.) 1, 10, 25.
(4) 10 A. & E. 259.
(5) 5 A. & E. 1.
(6) 11 H. L. C. at pp. 501, 508, 511; 35 L. J. (M.C.) at pp. 22, 25, 26.

to what might fitly be described as the public government of the country." Lord Westbury, C., says: "The only occupier exempt from the operation of the act is the king, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown. But this ground of exemption does not warrant many decisions which have held that property used for public purposes is not rateable." So Lord Chelmsford says the only two exemptions are, first, where there is no beneficial occupation; the second, "which does not arise from the act itself, but which is founded on a general principle of law, applies only to the Crown, which not being named in the act is not bound by it."

THE QUEEN *v.* CASTLE VIEW.

ON appeal against a poor-rate for the township of the Castle View, in the borough of Leicester, the sessions quashed the rate subject to the following case:—

The appellants, as the justices of the county of Leicester, were assessed in the sum of 150*l.*, in respect of the annual value of the building known as the Castle, situate within the township. The place had not been previously rated, or if rated the rate had not been paid.

The property in question is parcel of the Duchy of Lancaster. The duchy having been finally united to the Crown in the reign of Henry IV., the Castle of Leicester has since been and is now crown property. In the history of the place it is stated to be the great hall of what was once the castle of John of Gaunt and the ancient Earls of Leicester. Its custody is committed to Lord Berners, the present constable, by letters patent, under the seal of the Duchy of Lancaster, "To have, hold, enjoy, occupy, and exercise the said office of keeper or constable of our Castle of Leicester aforesaid, with the appurtenances, unto the said Henry William Lord Berners, to be executed by himself or by his sufficient deputy or deputies. Provided always nevertheless, and these our letters patent are upon this express condition, that he, the said Henry William Lord Berners, his deputy or deputies, shall, and will, at all times, permit and suffer all and singular her Majesty's records to be kept and deposited in the house of the

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said Castle, with free ingress, egress, and regress, in and upon the said Castle, for the auditor of our said duchy, and all other our proper officers for that purpose, to have and take for their pleasure, as well for inspecting and using such records, as for the entertainment and reception of the said officers in such and the like manner, and for all such other purposes as have been heretofore allowed and used. And also shall, and will, at all times, permit as well the general assize of oyer and terminer, and gaol delivery, and nisi prius, as the general quarter sessions of the peace for the said county of Leicester, to be held and kept in the said Castle without any let or molestation, as heretofore accustomed."

The constable of the Castle attends there once a year either in person or by deputy, after the election of the Mayor of Leicester, when an oath is administered to that officer, the purport and substance of which, it is said, are that he will not infringe on the privileges of the Castle. With this single exception it does not appear that the actual attendance of the constable or his deputy is required during the year in the performance of any duty or service in connection with the Castle. He receives, by the terms of the letters patent, a yearly fee of 3*l.* 0*s.* 8*d.* The deputy constable of the Castle is Mr. Reeve, who is also the deputy clerk of the peace for the county of Leicester. There are two sets of keys of the Castle, one set is kept in the office of the clerk of the peace, to which Mr. Reeve can have access when he pleases, the other set is kept by the Castle keeper.

The building has been repaired, altered, and enlarged from time to time, by the order and direction of the magistrates at quarter sessions, and the costs have been uniformly defrayed out of the county funds. It is included in the report of the county surveyor, which he makes periodically to the sessions, on the state of the county buildings.

The appellants cannot extend the building beyond its present foundations, but having by the terms of the letters patent, and claiming also a prescriptive right to use the Castle as a court of justice, they have raised the walls, and endeavoured to make the building suitable for that purpose.

Prior to the year 1858 complaints were made by the judges and

others attending the assizes of the inadequate accommodation the Castle afforded, and in that and the following year extensive alterations were made by the order and direction of the appellants at sessions in the usual way, and the cost also as usual was paid out of the county rates.

The total expenditure from 1858 to 1865, both inclusive, is 2545*l.* 11*s.* 10*d.* The Castle now comprises the following courts and offices:—6 cells, 1 coal-cellar, 2 courts (criminal and nisi prius), entrance hall, 2 judges' private rooms, 2 jurors' retiring rooms, 1 record room, 1 barristers' robing room, 1 grand jury room 1 magistrates' room, 2 witnesses' rooms (male and female). The appellants appoint a person to take charge of the Castle, who is commonly called or known as the Castle keeper, and they pay him an annual salary of 45*l.*, in addition to which he receives perquisites of uncertain and unascertained amount, from the various public bodies whose meetings are held there, as well as from private persons.

The Castle is now used for holding the assizes and the quarter sessions, for keeping the records of the county, these being the only purposes mentioned in the letters patent.

The appellants use it for no other purposes, but it is a matter of public notoriety that the Castle has been, and is, used for the following purposes:—1st. For holding the sheriff's court, as well for the election of the knight of the shire, as for the trial of issues. 2nd. For holding the monthly sittings of the county court. 3rd. For the meetings of the commissioners of turnpike roads, some of which roads extend beyond the boundary of the county of Leicester, and for the meetings of highway boards for the Leicester district. 4th. For the meetings of the commissioners of assessed and income tax. 5th. For the sittings for the revising barrister for the southern division of the county. 6th. In part for the municipal elections. 7th. For polling booths for one or more of the borough wards on the occasion of a borough parliamentary election. 8th. For various meetings of local interest, convened by the high sheriff of the county.

The question for the opinion of the Court was, whether the appellants are liable to be rated in respect of the use and occupation of the premises as before mentioned.

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June 13. *Merewether*, and *W. J. E. Bennett*, for the appellants, assuming that the Castle was rateable at all, cited *Reg.* v. *Morrish* (1), *Reg.* v. *Justices of Worcestershire* (2), as shewing that the justices had no exclusive or beneficial occupation, and therefore were not rateable; on which the Court called upon

Keane, Q.C. (*J. E. Hall* with him), for the respondents, and he admitted that he could not contend that the justices were rateable.

COCKBURN, C.J. It is quite clear that in the last case the right person has not been rated; but I take the opportunity of saying that I think the Castle is not rateable in the hands of the constable or his deputy. It is granted by the Crown for the express purpose of being used for holding the assizes, though it is true that it is allowed to be also used for certain local purposes.

As to the other case, that might have raised a much more debateable point, and I am not now prepared to decide that buildings used for the purpose of the mere local police would be within the only exception now allowed by the decision in the *Mersey Docks Cases* (3); and were it necessary to decide that point I should wish for further time to consider. But in the present case it appears that the police of the county of Leicester are subject to an annual government inspection, and an annual grant is made by the Treasury towards their maintenance. I think, therefore, under these circumstances, that the buildings used and occupied for the purpose of the police by the chief constable and inspector may be said to be used for public purposes, in the sense of government purposes, and so be brought within the one exemption from rateability, viz. as premises occupied for the purposes of the Crown.

MELLOR, J. I am of the same opinion. On reading the *Mersey Docks Cases* (3) one cannot fail to see that, although the decision did produce a great revolution in the subject of rating, yet the time

(1) 32 L. J. (M.C.) 245; 10 Jur. N.S. 71.
(2) 11 Ad. & E. 57.
(3) 11 H. L. C. 443; 35 L. J. (M.C.) 1; 11 Jur. N.S. 746

had arrived finally to decide between conflicting principles; for the cases as to the exemption from rateability of buildings occupied for public purposes had been so eaten away by the decisions in the time of Lord Campbell that it required only a touch to destroy them; and this was done in the House of Lords by tracing the exemption to its true foundation, viz. the maxim that the Crown was not bound, not being named in the statute 43 Eliz. c. 2.

Lord Cranworth, after referring to the course of decisions, says: "In these circumstances, thinking, as I do, that there is nothing in the statute of Elizabeth expressly or impliedly exempting from rateability the occupier of valuable property merely because the benefit of the occupation is to go to the public, I think your lordships ought not to consider yourselves fettered by any decisions of the Courts below, but that you ought to lay down the law as you think it ought to have been laid down if this question had arisen before any of those decisions had been pronounced." But then he proceeds: "To avoid all misconception, I wish to add that there are certain cases to which the observations I have made do not apply. The Crown not being named is not bound by the act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown, or for the purposes of the Crown, are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown that this mistake has arisen. This principle exempts from rates, not only royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. On the same ground police courts, county courts, and even county buildings occupied as lodgings at the assizes for the judges have been held exempt. These decisions, however, have all gone on the ground, more or less sound, that these might all be treated as buildings occupied by servants of the Crown and for the Crown, extending in some instances the shield of the Crown to what might fitly be described as the public government of the country." (1)

When you look at this classification of cases it clearly was not intended to affect such cases as profess to be decided on the ground

(1) 11 H. L. C. at p. 508; 35 L. J. (M.C.) at p. 25, 11 Jur. N.S. 747, 501

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that, in effect, the Crown was in occupation by public servants carrying out the purposes of the government of the country. The queen is the fountain of justice to all the subjects of the realm, and buildings which are necessarily occupied for the purposes of administering justice and for cognate objects, are within the exception as buildings really occupied for the discharge of duties arising out of the prerogatives of the Crown. In the present case the purposes of the occupation are so bound up with the administration of justice, that I think we cannot distinguish the present from cases which were not intended to be affected by the opinion of the judges delivered in the *Mersey Docks Cases* (1), nor, as it appears to me, by the judgment of the House of Lords. I am, therefore, of opinion that the order of the court of quarter sessions was right.

SHEE, J. I am of the same opinion. The principle established by the *Mersey Docks Cases* (1) is, that all property capable of a rateable value is rateable, unless occupied by the Crown, or by its servants. A distinction is taken by Blackburn, J. (2), expressing the opinion of the judges, and by Lord Cranworth (3), between the occupation of the Crown by its proper servants, and the occupation of the Crown for public purposes. But Lord Cranworth classes the offices of the Secretaries of State, the Horse Guards, and the Post Office, with police courts and other county buildings, which latter are primarily established and maintained by the local authorities, and are not strictly speaking used for public purposes in the same sense as the larger establishments classed with them.

As to the second case, beyond all question the justices are not rateable. I cannot but observe that some opportunity for distinction was afforded in the House of Lords between different classes of buildings used for public purposes, between the case of the great government offices and that of buildings for purposes only indirectly connected with the government. Lord Cranworth (1) alludes to the decisions as having "all gone on

(1) 11 H. L. C. at pp. 464, 508; 35 L. J. (M.C.) at pp. 19, 25.
(2) 11 H. L. C. at p. 464; 35 L. J. (M.C.) at p. 10.
(3) 11 H. L. C. at p. 508; 35 L. J. (M.C.) at p. 25.

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the ground, *more or less sound*, that the latter might be treated as buildings occupied by the servants of the Crown, and for the Crown."

Orders of sessions affirmed. (1)

Attorneys for appellants: *Austen, De Gex, & Harding, for Freer & Reeve, Leicester.*

Attorneys for respondents: *Vizard, Crowder, & Co.*

THE QUEEN, ON THE PROSECUTION OF JOHN CHARLES CARWITHEN, APPELLANT; *v.* THE INHABITANTS OF SHERFORD AND OTHERS, RESPONDENTS.

June 28.

Poor-rate—Principle of Rating—Tithe Rentcharge—Rateable Value—Deduction for Curate's Salary—6 & 7 Wm. 4, c. 96.

The principle of the decision of the House of Lords in the *Mersey Docks Cases* (11 H. L. C. 443; 35 L. J. (M.C.) 121) is that all property capable of beneficial occupation is to be assessed to the poor-rate irrespectively of the amount of remunerative value to the particular occupier. That principle is not consistent with the decision in the *Hackney Case* (E. B. & E. 1; 27 L. J. (M.C.) 233); in which, on rating a tithe rentcharge, a deduction was allowed to the incumbent in respect of the salary of a curate whose services were necessary, in addition to those of the incumbent himself, to the due discharge of the duties of the benefice; and which can only be supported on the ground, that the incumbent was bound to employ a curate whom he had to pay out of the subject matter in respect of which he was rated, and the occupation by him of the rentcharge was rendered pro tanto less beneficial. The latter case must, therefore, be taken as overruled; and such a deduction ought not to be allowed.

THREE appeals to the Devon quarter sessions, by the Rev. John Charles Carwithen, against poor-rates for the parishes of Chivelstone, Sherford, and Stokenham, respectively, were by the consent of the parties consolidated; and the sessions amended each of the rates by reducing the appellant's rating, subject to the opinion of the Court of Queen's Bench on a case.

The facts of the case are fully stated in the judgment of the Court, the question being whether, on assessing the tithe rentcharges of the appellant, as incumbent of the three parishes, making together one benefice, he was entitled to be allowed deductions in respect of the salaries which he paid to two curates.

(1) See the preceding and the next case.

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June 12. (1) The *Solicitor General*, and *Lopes*, for the appellant. The deductions in respect of the curates' salaries were rightly made. Tithes, and therefore a tithe rentcharge, are rateable by the statute 43 Eliz. c. 2; but the deductions are claimed under the 6 & 7 Wm. 4, c. 96, and these salaries are a necessary outgoing to command the rent; and this must be the principle of the decision in the *Hackney Case*. (2) In the argument for the respondents (3) it was urged that the curate's salary was merely a mode in which the owner of the rentcharge expends his profits. On which Lord Campbell, C.J., says: "May not that be necessary, in order to entitle the incumbent to take the profits?" And again (4) the chief justice asks whether the supposed tenant must not be "a lessee who takes upon himself the incumbent's duties?" Or it may be put, as it was in the judgment (5), that the incumbent was bound to employ a curate whom he must pay out of the rentcharge. It is so much withdrawn from his beneficial occupation, just as if the bishop had assigned so much of the rentcharge to the curate. But whatever is the ground of the decision, and although it has been questioned, it has been followed in several subsequent decisions: *Williams* v. *Llangeinwen* (6); *Wheeler* v. *Burmington* (7); *Scriven with Tentergate* v. *Fawcett* (8), and it is now too late to attempt to overrule it. It is not found as a fact in the present case that the circumstances of the three parishes were such as to render the appointment of curates compulsory; but it would be impossible to have two services in each church without the assistance of curates, and by 1 & 2 Vict. c. 106, s. 20, the bishop can compel two full services in every parish church and chapel of a benefice composed of more than one parish. At all events, the employment of curates is right and proper within the decision of the *Hackney Case*. (2)

[BLACKBURN, J. The question to my mind is, whether the

(1) The case was first argued before Blackburn, Shee, and Lush, JJ., in Easter Term, May 1, when the Court directed that it should be reargued before the full Court.

(2) E. B. & E. 1; 27 L. J. (M. C.) 233, 4 Jur N S 1050.

(3) E. B. & E. at pp. 27-28.

(4) E. B. & E. at p. 28.

(5) E. B. & E. at pp. 52-4; 27 L. J. (M.C.) at pp. 243-244, 4 Jur N S 1060

(6) 1 B. & S. 699, 707, 708; 31 L. J. (M.C.) 54, 56, 57, 8 Jur N S 303

(7) 1 B. & S. 709; 31 L. J. (M.C.) 57, 8 Jur

(8) 3 B. & S. 797, 803; 32 L. J. (M.C.) 161, 163, 9 Jur N S 1125.

Mersey Docks Cases (1) have not impliedly overruled the *Hackney Case.* (2)]

There is nothing to be found in the *Mersey Docks Cases* (1) bearing on this point.

[BLACKBURN, J. The principle of the decision in those cases is, that where a person is in the occupation of property capable of yielding a profit, the occupier is rateable in respect of that profit, and it is quite immaterial to whom it is paid. If the tithes were rendered in kind and were rented, the lessee would be rateable in the same amount, whether the whole rent were paid to the incumbent, or part went to a curate.]

The answer to that is what has been already cited from Lord Campbell, C.J., in the *Hackney Case* (2), that the supposed tenant must be a person coming in under the same circumstances and with the same liabilities as the incumbent; and if so, the rent he would pay would be minus the amount of curates' salary.

Mellish, Q.C., for the respondents. The *Hackney Case* (2), and the cases that followed it, are not consistent with the principle of the decision of the House of Lords in the *Mersey Docks Cases* (1), which is, that all property rateable under the 43 Eliz. c. 2, must be rated according to the amount of beneficial occupation of which it is capable, irrespective of the amount of benefit the occupier himself may get; and the deductions allowed by 6 & 7 Wm. 4, c. 96, are only such an expenditure as the supposed landlord must make in order to keep the property in a condition for beneficial occupation, or, in the words of the statute, to command the rent. In the *Hackney Case* (2) the payment of a salary to a curate, when his services are necessary in addition to the incumbent's own services, was held a proper deduction, on the ground that the incumbent was bound to pay it, and therefore there was so much withdrawn from the incumbent's beneficial occupation. But that is not so; the occupation remains equally beneficial, though the occupier does not reap the benefit himself. The obligation to pay a curate is really a charge on the person; and in *Hawkins' Case* (3) it was held that such a charge could not

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1, 11 Jur NS 749

(2) E. B. & E. at pp. 1, 27, 28; 27 L. J. (M.C.) 233; 4 Jur NS 1050

(3) E. B. & E. 55; 27 L. J. (M.C.) 248; 4 Jur NS 1050, 1061

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be deducted. It is not the benefice, in respect of which the duty attaches, that is the subject of the rate, but the tithe rentcharge. Suppose, instead of tithe rentcharge, it were tithe in kind that the incumbent received, the tenant farming the tithes would have to pay in respect of the whole value of the tithes, and it would be perfectly immaterial whether the whole amount went into the incumbent's pocket or partly towards the curates' stipend. The tithe rentcharge is so much rateable property, and this liability cannot be got rid of pro tanto by the occupier, by saying so much is not in effect payable to me. The decision in the *Hackney Case* (1), on this point, therefore, is clearly wrong, and is inconsistent with the true principle of rating as enunciated by the House of Lords in the *Mersey Docks Cases*. (2) Lord Westbury, C., says: "On principle, it is by no means necessary that the occupation should be beneficial to the occupier. It is sufficient if the property be capable of yielding a clear yearly rent over and above the necessary outgoings." (3) And Lord Cranworth: "I can discover nothing, either in the words or spirit of the act, exempting from liability the occupier of valuable property, merely because the profits of the occupation are not to be enjoyed by him." (4) The apportionment of the amount of deduction in respect of the two salaries amongst the several parishes was agreed to; but the difficulty of doing this on any principle shews the falsity of the principle of allowing any deduction whatever.

G. Tayler, and *McKellar*, on the same side, cited *Rex* v. *Joddrell* (5); *Reg.* v. *Groves* (6); *Lawrence* v. *Tolleshunt Knights*. (7)

Cur. adv. vult.

June 28. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Shee, JJ.) was delivered by

MELLOR, J. It appeared from the special case stated by the court of quarter sessions, that the Rev. John Charles Carwithen

(1) E. B. & E. 1; 27 L. J. (M.C.) 233, 4 Jur. N.S. 1050

(2) 11 H. L. C. 443; 35 L. J. (M.C.) 1, 11 Jur. N.S. 746

(3) 11 H. L. C. at p. 501; 35 L. J. (M.C.) at p. 22. 11 Jur. N.S. 756

(4) 11 H. L. C. at p. 507; 35 L. J. (M.C.) at p. 25, 11 Jur. N.S. 757

(5) 1 B. & Ad. 403.

(6) 2 E. & E. 793; 29 L. J. (M.C.) 179. 6 Jur. N.S. 1014

(7) 2 B. & S. 533; 31 L. J. (M.C.) 148. 8 Jur. N.S. 866

appealed against three several rates for the relief of the poor in the parishes of Chivelstone, Sherford, and Stokenham, in the county of Devon, under the following circumstances:—He is the vicar of the three parishes under one induction to the parish of Stokenham, which carried with it the two other parishes of Chivelstone and Sherford. It is, therefore, one benefice composed of three parishes. (1) In each case, the tithes have been commuted, and the appellant is rated in each parish in respect of his vicarial tithe rentcharge, viz. in Chivelstone at the rateable value of 141*l.*, in Sherford of 147*l.* 8*s.*, and in Stokenham of 304*l.* The appellant receives the vicarial tithe rentcharge for the three parishes, as well as the other profits arising within the same. For the parish of Chivelstone he appoints a curate, who resides in the parish, and is licensed by the bishop, and receives from the appellant a stipend of 85*l.* per annum for discharging the eccle-

(1) The following additional facts were stated in the case: Stokenham, Chivelstone, and Sherford, are three distinct parishes adjoining each other; each has a definite boundary, and its own parish church; each separately maintains its own poor, has its separate churchwardens and overseers and other parish officers, and distinct vestry, and its separate church rates and other parochial rates and tithe apportionment.

The church of Chivelstone is distant 3½ miles, and the church of Sherford 2½ miles from the church of Stokenham and from the vicarage house in which the appellant resides, and the distance between Chivelstone and Sherford is about 3½ miles. Stokenham contains about 5901 acres, with a population of 1556; Chivelstone about 2696 acres, with a population of 523; Sherford about 2326 acres, and a population of 404.

The tithe rentcharge of Stokenham is 355*l.* 13*s.* 2*d.* There is a vicarage-house and garden in the parish, rated separately from the rentcharge, at the rateable value of 20*l.* a year, and the surplice fees are about 10*l.* a year. The tenant's rates and taxes, and other outgoings in respect of the tithe rentcharge, amount to 65*l.* 15*s.* 7*d.* a year. The tithe rentcharge of Chivelstone is 162*l.* 10*s.* 3*d.*, and the surplice fees, which the curate receives to his own use, are 1*l.* a year. The tenant's rates and taxes, and other outgoings (exclusive of the curate's stipend), amount to 30*l.* 13*s.* 8*d.* a year. The tithe rentcharge of Sherford is 169*l.* 3*s.* 8*d.*, and the surplice fees, which the curate receives to his own use, are 1*l.* a year. The tenant's rates and taxes, and other outgoings (exclusive of the curate's stipend), amount to 24*l.* 17*s.* 4*d.* a year.

At the time of the appellant's induction, he found that his predecessor had employed two curates, and that in each of the three parishes divine service had been performed twice on Sundays at the regular hours. The appellant continued the practice of his predecessor, and employed, and continues to employ, two curates, in order that these two services may be fully and regularly performed in each of the three parish churches.

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siastical duties of the parish. In Sherford the like arrangement subsists, and the curate receives from the appellant 80*l.* per annum. The appellant himself performs the duty and resides in the parish of Stokenham.

No deduction was made, in rating the appellant as the occupier of the three tithe rentcharges, in respect of the stipends of 85*l.* and 80*l.* paid to the curates of the parishes of Chivelstone and Sherford. The appellant claimed to have deducted from the several rates made in the three parishes for the relief of the poor the amount of such stipends, and on the hearing of the appeal the court of quarter sessions considered that the appellant was entitled to such deduction, and ordered the several rates to be amended by reducing the same—in Chivelstone to 89*l.* 6*s.* 7*d.*, in Sherford to 101*l.* 16*s.* 4*d.*, and in Stokenham to 209*l.* 17*s.* 7*d.*

This mode of dealing with the deduction, by apportioning it to the three parishes, was not objected to at the quarter sessions, or before us; but the court of quarter sessions granted a case for the opinion of this Court on the question, whether the appellant is entitled to be allowed, in ascertaining the rateable value of the tithe rentcharges of the several parishes, a deduction in respect of the stipends so paid by him to the curates of Chivelstone and Sherford.

It was not denied by Mr. Mellish, on behalf of the parish officers, that, but for the judgment of the House of Lords in the recent cases of *The Mersey Docks* (1), the present case must have been determined by the judgment of this Court in the *Hackney Case* (2), unless we could have been induced to reconsider the grounds of that decision; and it is no doubt true that the case in question has not been followed in subsequent cases without some hesitation. In *Williams* v. *Llangeinwen* (3), Blackburn, J., although feeling bound by it as a judgment of this Court, expressed considerable doubt whether it had been rightly decided; and in the subsequent case of *Wheeler* v. *Burmington* (4) Cockburn, C.J., said that the principle of that decision "ought not to be extended;" and Black-

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1, 11 Jur N S 746

(2) E. B. & E. 1, 52; 27 L. J. (M.C.) 233, 243, 4 Jur N S 1058

(3) 1 B. & S. at p. 708; 31 L. J. (M.C.) at p. 57, 8 Jur N S 304

(4) 1 B. & S. at pp. 726, 727; 31 L. J. (M.C.) at p. 62. 8 Jur N S 308

burn, J., in the same case, said, "it was not to be followed, except where the facts were the same." It was, however, again admitted to be binding upon this Court in the case of *Scriven with Tentergate* v. *Fawcett.* (1)

Under these circumstances, although we might have thought that the *Hackney Case* (2) had not been based upon a sound application of the true principles of the law of rating, we should have thought it unwise to depart from it, after it had been followed in so many subsequent cases. Since then, however, the case of *The Mersey Docks* (3) has been decided by the House of Lords, which, as it appears to us, has not only set us free from the authority of the *Hackney Case* (2), but has in effect overruled it, by placing the law of rating property to the poor-rate upon principles entirely inconsistent with it. In that case Lord Cranworth said: "I can discover nothing, either in the words or in the spirit of the act, exempting from liability the occupier of valuable property, merely because the profits of the occupation are not to be enjoyed by him, or by any one in whose behalf he is occupying, but are to be devoted to the benefit of the public." (4) The Lord Chancellor in the same case, after referring to the Parochial Assessment Act, 6 & 7 Wm. 4, c. 96, said: "On principle, it is by no means necessary that the occupation should be beneficial to the occupier. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings." (5) Now the necessary outgoings are specifically stated in the statute to be "the probable average annual cost of repairs, insurance, and other expenses, *if any, necessary to maintain the property in a state to command such rent.*" In the same case Lord Chelmsford said: "Primâ facie, therefore, a liability to the rate would seem to attach upon every occupation from which benefit is derived; and no occupier can claim exemption unless he can find it in the act itself, or it arises from some principle of law applicable to all cases." (6)

(1) 3 B. & S. 797, 803; 32 L. J. (M.C.) 161, 163.
(2) E. B. & E. 1; 27 L. J. (M.C.) 233.
(3) 11 H. L. C. 443; 35 L. J. (M.C.) 1.
(4) 11 H. L. C. at p. 507; 35 L. J. (M.C.) at p. 25.
(5) 11 H. L. C. at p. 501; 35 L. J. (M.C.) at p. 22.
(6) 11 H. L. C. at p. 511; 35 L. J. (M.C.) at p. 26.

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We think that the only ground upon which the *Hackney Case* (1), could be supported, was that the incumbent was forced to employ a curate to assist him in the performance of the spiritual duties of his office, for which assistance he had "to pay out of the subject matter in respect of which he was rated," and so the occupation by him of the rentcharge was rendered pro tanto less beneficial.

That ground is really overruled by the late decision in the House of Lords, and we must deal with the present case, therefore, upon the construction of the statute of Elizabeth, as established by that decision. If the income of the incumbent, instead of being a rentcharge, were derived from tithes actually let, such tithes would now be rateable in the hands of the tenant, subject only to such deductions, if any, as were necessary to maintain the property in such a state as to command such rent; that is, the rent which the hypothetical tenant would have given in order to be allowed to take the tithes. If the income were derived from the occupation of glebe, it would have been rateable at such rent as the hypothetical tenant would have given after making such deductions as would be necessary to maintain the property in a state to command such rent. In neither case could the consideration of the stipends payable to the curates have entered into the deductions to be made, according to the rule established by the House of Lords. Upon what principle, then, can it be now contended that, in the case of a tithe rentcharge, where the problem of what the hypothetical tenant would give for the occupation of it has already been solved by the calculation upon which the commutation was based, a deduction in respect of the stipends of the curates should be made; when it must be conceded that it could not be done in either of the cases above suggested, of tithes actually taken, or of glebe actually occupied?

The *Hackney Case* (1), decided that no deduction could be made where the incumbent himself discharged all ecclesiastical duties; and there seems no reason why the poor-rate in the other parishes is to be diminished because the present incumbent is compelled to employ a curate in those parishes to perform the duties which he himself performs in Stokenham. The subject matter of the

(1) See E. B. & E. at p. 53; 27 L. J. (M.C.) at p. 244, 4 Jur. N.S. 1068.

occupation which is rated is the amount of the tithe rentcharge. That amount is not made more or less by the services of the vicar or the curates. The hypothetical tenant would give the same price for the occupation of the rentcharge, whether the services in the several parishes were performed by the vicar or the curates or were left wholly unperformed. So in the case of an income from glebe, or from tithes, the occupation value of either would in no case depend upon whether the services were performed by the incumbent, or by a curate, or were not performed.

The fallacy of the argument on behalf of the appellant consists in confounding *the rateable value to the poor rate with the remunerative value to the incumbent.*

We therefore answer the question proposed to us by the court of quarter sessions in the negative; and the order of sessions must be quashed.

Order of sessions quashed. (1)

Attorney for appellant: *G. F. Cooke, for Drake, Exeter.*

Attorneys for respondents: *Hughes, Hooker, and Bultenshaw, for T. S. Burrell, Kingsbridge.*

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June 15.

Marine Insurance—Concealment, when avoids Insurance—Principal and Agent—Fraud of Agent, Principal affected by—Duty of Agent to telegraph loss.

An agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship and cargo, ought to do so by electric telegraph, where that means of communication is in general use; and if the agent omits to discharge this duty, and the principal, being thus left in ignorance of a fact material to be communicated to the underwriter, effects an insurance, the insurance is void, on the ground of concealment or misrepresentation.

The plaintiff, in Liverpool, employed an agent at Smyrna to buy madder on his account, and to ship and consign the cargoes to him; the agent purchased and shipped a cargo of madder, and advised the plaintiff on the 12th of January, and sent the shipping documents on the 19th of January. The ship sailed on the 23rd of January, but was stranded in the course of that day, and the cargo became a total loss. Intelligence of the loss was communicated to the agent on the 24th of January, and on the 26th, the next post day, he wrote to the plaintiff announcing the loss, but purposely abstained from telegraphing, in order that the plaintiff

(1) See the two preceding cases.

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might not be prevented from insuring. The plaintiff, on the 31st of January, after the receipt of the letters of the 12th and 19th, but before the receipt of the letter of the 26th, and without any knowledge of the loss—which, however, had been telegraphed and posted in Lloyd's lists—effected an insurance:—

Held, that the plaintiff could not recover against the underwriter.

DECLARATION against the defendant as chairman of the Alliance Marine Assurance Company, claiming damages from the company in respect of the company not having delivered to the plaintiff a policy of insurance on certain goods shipped on board a ship called the *Anne Duncan*, pursuant to an agreement alleged by the plaintiff to have been entered into between the plaintiff and the company, and in respect of the company not having paid the sum of money which the plaintiff alleged would have become due on such policy if the same had been so delivered.

The third plea stated, in substance, that the alleged agreement was obtained from the company by the wrongful and improper concealment by the plaintiff from the company of certain facts and information which the plaintiff knew as to the ship having run ashore on or about the 23rd of January, 1861, which matters so concealed were unknown to the company; that the matters which were so wrongfully and improperly concealed were at the time of the making of the promise material to be known to the company, and material to the risks against which the company made the promise to indemnify the plaintiff.

The cause was tried at the Liverpool summer assizes, 1861, before Crompton, J., when a verdict was found for the plaintiff. On the 27th of June, 1862, a rule for a new trial, obtained at the instance of the defendant, was made absolute. The cause was tried a second time at the Liverpool summer assizes, 1863, before Mellor, J. At the second trial it was agreed that the case should be left to the jury on the question, whether or not the plaintiff, before the instructions were given for the insurance and before it was effected, had actual knowledge of the ship or cargo having been lost, or of any misfortune having happened to, or of anything being amiss with, the ship or cargo, or of the ship or cargo having sustained any injury. The jury found for the plaintiff. A judge's order was made, before the jury returned their verdict, that, in the event of the jury finding for the plaintiff, the verdict should

be entered for the sum of 1200*l.*, plus interest to the day of signing judgment, less the amount of the premium and salvage, and subject to a special case to be stated from the notes taken by Crompton, J., with the addition of the evidence of Rees taken by Mellor, J., and the letters therein referred to. The Court were to draw any inferences of fact they thought proper.

The facts, so far as they are material, sufficiently appear from the judgment of the Court, at p. 518.

May 7. *Jones, Q.C.* (*Temple, Q.C.*, with him), for the plaintiff. The plaintiff has been guilty of no concealment. At the time he effected the insurance he was not aware of the accident that had happened to the vessel; but Rees, the plaintiff's agent, was aware of it, and the question is, whether the knowledge of the agent is the knowledge of the principal, so as to avoid the insurance. The agent was a stranger as to effecting the insurance; he was not, for this purpose, the plaintiff's agent, and there was no special duty arising out of his ordinary employment to communicate the information he had of the stranding of the vessel; and the omission of the agent to give the information to his principal will not prevent the principal from recovering against the underwriter. This point has been expressly decided in *Ruggles* v. *General Interest Insurance Company* (1), by Mr. Justice Story. It was held in that case that an insurance on a vessel by the owner, bonâ fide made without knowledge of her loss, was not avoided by the master having purposely omitted to communicate the loss to the owner in order that he might effect an insurance. In summing up, Mr. Justice Story says: "Upon what grounds does the principle contended for by the defendants stand? Not upon the ground of agency, for the master was not the agent as to the insurance; not upon the ground of imputed knowledge or fraudulent concealment, for that is excluded by the argument. It must then be on the ground that the act of the master binds the owner; and that an omission of duty to his owner, by which third persons are prejudiced, destroys the rights of his owner, however innocent he may be. There is certainly no public policy or convenience in such a principle." The law thus laid down is correct.

(1) 4 Mason's Rep. 74, 78.

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A merchant cannot carry on his business unless he insures, but neither public policy nor convenience demand that, when he is innocent of all misrepresentation or concealment, he should be ruined because his agent keeps back information which morally he ought to have communicated. There are two cases which will be relied on by the defendant, but the grounds of these decisions are examined by Mr. Justice Story in *Ruggles* v. *General Interest Insurance Company* (1); and both cases can be distinguished from the present. The first is *Fitzherbert* v. *Mather*. (2) In that case a person employed to ship goods wrote a letter on the 16th of September, advising the shipment, but did not send it until the 17th, there being no post until that day; before the post left on the 17th of September the ship was lost; an insurance of the goods was effected on the representation contained in the letter of the 16th. The Court held that the facts contained in the letter must be taken as representing to the underwriters the state of things at the time the post left the place, and that there had been a misrepresentation. Here, the facts on which the plaintiff acted were perfectly true. The other case, which will be relied on by the defendant, was *Gladstone* v. *King*. (3) In commenting on that case Mr. Justice Story (4) says: "In that case a letter was written by the captain and received by the owner, and of course presumed to be shewn to the underwriter, in which no notice was taken of an antecedent partial loss. The owner procured a policy covering *all risks from the commencement of the voyage*. The question was, whether the partial loss could be recovered. The Court held that it could not, and the decision was, in principle, right; for it falls directly within the authority of the case in 1 T. R. 12. There was an implied warranty on the part of the owner that there was no loss up to the time of writing that letter." That case may be treated as an anomalous decision, for the judgment proceeded on the ground that the antecedent damage, which had not been communicated by the master, was considered as an implied exception out of the policy. These two cases, therefore, when examined, are no authority for the defendant. *Ruggles* v. *General Interest Insurance Company* was, by bill

(1) 4 Mason's Rep. at p. 75.
(2) 1 T. R. 12.
(3) 1 M. & S. 35.
(4) 4 Mason's Rep. at p. 75.

of exceptions, taken to the court of error (1), and the judgment was affirmed, but on different grounds from those on which it was decided in the court below. The court of error held that, after the destruction of the vessel, the relation of principal and agent between the shipowner and master had ceased from necessity; and though there might be a moral duty resting on the master to communicate information of the loss, there was no legal obligation binding him to do so. No doubt the reasoning of Mr. Justice Story in *Ruggles* v. *General Interest Insurance Company* (2), is disapproved of by Duer, vol. ii. pp. 418, 419, and also by Phillips, vol. i. p. 293, 3rd ed.; but those expressions of dissent are only the opinions of text writers. *Andrews* v. *Marine Insurance Company* (3), a case decided also in the American courts, is in favour of the plaintiff; it was there held that the omission of the master to give intelligence of the loss of his vessel did not avoid an insurance on the ground of fraud. *Stewart* v. *Dunlop* (4) may be cited as an authority for the defendant; but in that case the insurance was effected with the full knowledge of the loss of the vessel by the principal; the assured, therefore, clearly could not recover against the underwriter. Conceding, however, that it was the duty of Rees, the agent, to have communicated the information, he was not bound to resort to extraordinary means of communication; he is not bound to send an express; it is enough if he sends the information by post: Arnould on Insurance, 2nd ed. p. 579. Moreover the agent's duty was superseded by the information given by Lloyd's agent at Smyrna; for he had telegraphed the loss, and it had appeared in Lloyd's list of the 29th of January. In *Friere* v. *Woodhouse* (5), it was ruled by Burrough, J, that intelligence contained in Lloyd's lists must be presumed to be within the knowledge of the underwriter, and need not be disclosed.

Cohen, for the defendant. The cases of *Fitzherbert* v. *Mather* (6), and *Gladstone* v. *King* (7), are direct authorities for the defendant. *Ruggles* v. *General Interest Insurance Company* (2) is virtually overruled in error. (1) Duer, vol. ii. p. 419, in commenting

(1) 12 Wheaton, 408.
(2) 4 Mason's Rep. 74.
(3) 9 Johnson's Rep. U.S. 32.
(4) 4 Bro. P. C. 483*n*.
(5) 1 Holt, N. P. 572.
(6) 1 T. R. 12.
(7) 1 M. & S. 35.

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on this case in error, says: "It seems a necessary inference, from the terms in which the judgment of the Supreme Court was delivered, that had the learned judges been of opinion that the master continued to be the agent of the owner, they would have held that he was bound to communicate the loss, and that its concealment was a fraud that avoided the policy." Mr. Duer then discusses whether the omission of the agent, either from fraud or neglect, to give intelligence of the loss, may operate as a fatal concealment; and he lays down the rule thus: "The general rule in such cases undoubtedly is, that the loss must be borne by him who employed and trusted the person from whose act or default it proceeded. It is for this reason that a virtual misrepresentation by an agent, it is admitted, avoids the policy; and a concealment, if the reason equally applies, must lead to the same result." And again he says: "When an agent effects the policy, the insurer has a right to believe that he is in the actual possession of all the information that his principal might have communicated. This belief is the basis of the contract; and if it be groundless, the policy is void. But when the principal himself effects the insurance, the underwriter has an equal right to believe that he is in the possession of all the information that his agent ought to have communicated. The presumption is as reasonable and legitimate in the one case as in the other, and it is equally the foundation of the contract." The reasoning of Mr. Justice Story in *Ruggles* v. *General Interest Insurance Company* (1) is again examined and dissented from by Duer, vol. ii. p. 788. Here, although Rees was not the plaintiff's agent for making the insurance, he was the agent employed generally by the plaintiff to buy and ship the cargo, and he clearly was the agent for giving intelligence of the loss of the vessel; and the only reason why he does not communicate the information is, that it would have prevented the plaintiff from effecting the insurance. It is well established that to avoid a contract on the ground of fraud it is, in general, essential that there should be moral fraud. In the case of a life insurance an innocent concealment does not vitiate the policy: *Wheelton* v. *Hardisty* (2); nor in the case of a suretyship does it avoid the guarantee: *North British Insurance Company* v. *Lloyd* (3);

(1) 4 Mason's Rep. 74. (2) 8 E. & B. 232; 27 L. J. (Q.B.) 241, 5 Jur. N.S.
(3) 10 Ex. 523; 24 L. J. (Ex.) 14, 1 Jur. N.S. 45.

Lee v. *Jones* (1); but there is a difference between the case of a marine insurance and all other contracts. Parke, B., in *Moens* v. *Heyworth* (2), lays it down: "Those instruments (marine insurances) are made upon an implied contract between the parties, that everything material known to the assured should be disclosed by them. That is the basis on which the contract proceeds; and it is material to see that it is not obtained by means of untrue representation or concealment in any respect." There is therefore an implied warranty that the assured will disclose all the information connected with the subject of insurance. The assured is the natural and sole depository of this information, and it is absolutely necessary it should be communicated to the underwriter, in order that he may form a right judgment of the nature of the risk and the proper rate of premium to be demanded: *Carter* v. *Boehm* (3); Arnould on Insurance, 2nd ed. p. 585. It thus becomes the duty of the agent to communicate to the principal all the information in his possession relating to the risk; and the agent is to act, not as if the principal were an uninsured owner, but in an honest manner; for if the law were otherwise, every merchant would instruct his agent not to communicate any loss or damage that might have happened, and this would be to encourage fraud and dishonesty. Here the defendant has been deceived; the deception has been caused by the conduct of the agent employed by the plaintiff, and he cannot recover for the loss.

Jones, Q.C., was heard in reply.

Cur. adv. vult.

June 15. The judgment of the Court (Cockburn, C.J., Blackburn and Shee, JJ.) was delivered by

COCKBURN, C.J. This was an action against the defendant, as chairman of the Alliance Marine Insurance Company, for the recovery of damages from the company in respect of the company not having delivered to the plaintiff a policy of insurance on certain goods shipped on board a vessel called the *Anne Duncan*, pursuant to an agreement alleged by the plaintiff to have been entered into between him and the company, and in respect of the

(1) 34 L. J. (C. P.) 131; 17 C. B. (N.S.) 482; 11 Jur. N.S. 81

(2) 10 M. & W. at p. 157.

(3) 3 Burr. 1905.

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company not having paid the sum of money which the plaintiff alleges would have become due on such policy if the same had been so delivered.

The agreement was for insurance on a cargo of madder, lost or not lost, shipped at Smyrna, on a voyage from Smyrna to Liverpool, on board the ship *Anne Duncan*, for and on account of the plaintiff, and consigned to him by one T. B. Rees, of Smyrna.

The plaintiff, a merchant at Manchester and Liverpool, dealt largely in madders in the Smyrna market, and Rees, being resident at Smyrna, was employed by him at a salary of 800*l.* a year to make purchases of madder on his account, and to ship and consign the cargoes to him. The cargo in question was purchased and shipped by Rees in the course of his employment as such agent. The ship, with the cargo on board, sailed from Smyrna on the 21st of January, 1861, but again brought up in the Gulf of Smyrna on the same day. She set sail again on the 23rd, but was stranded in the course of that day, and became a wreck. The cargo became a total loss. Intelligence of the stranding of the ship was communicated to Rees on the morning of the 24th. On the 26th, which was the first post day, he communicated by letter to the plaintiff the loss of the vessel; and the fact that though the cargo had been got out, yet as the vessel had had 12 feet of water in the hold, the greater part of the cargo would be seriously damaged. Having communicated this information, the letter proceeds thus: "I hope to goodness you are fully insured. On the 12th instant I forwarded you invoice and weights of the shipment by her, which gave you plenty of time to effect insurance. Lloyd's agents have telegraphed the disaster, which will reach London before my letter of the 19th instant, inclosing bill of lading. (1) I did not dare telegraph to you, for when once you had the intelligence in hand you were prevented from insuring." On the 31st of January the plaintiff, after receipt of the letters from Rees of the 12th and 19th of January, but prior to the receipt of that of the 26th, gave instructions to effect the policy, and the slip was signed on the same day by the company's agent at Manchester.

(1) The telegram was received, and the loss published in Lloyd's List of the 29th of January; but neither the plaintiff nor the company's agent was aware of it.

There was, therefore, no fraud or undue concealment by the plaintiff of a material fact within his personal knowledge. On the other hand, it is clear that the fact of the loss of the vessel and damage to the cargo might have been communicated to him by Rees by means of the telegraph, but was purposely kept back by the agent for the fraudulent purpose of enabling the plaintiff to insure. We think it clear, looking to the position of Rees as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and, looking to the now general use of the electric telegraph, in matters of mercantile interest, between agents and their employers, we think it was the duty of the agent to communicate with his employers by this speedier means of communication. From the letter of the agent it appears that, but for the fraudulent motive for his silence, he would, in the ordinary course of his duty, have conveyed the intelligence of the loss to his employer, and would have availed himself of the telegraph for that purpose.

Upon the above facts, the question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defence to the underwriter on a claim to enforce the policy.

Two cases decided in this court, one in the time of Lord Mansfield, the other in that of Lord Ellenborough, establish the affirmative of this proposition. In the case of *Fitzherbert* v. *Mather* (1), where an agent of the assured was employed to ship a cargo of oats, and to communicate the shipment to another agent who was employed to effect an assurance, an omission on the part of the former, who had written to announce the sailing of the ship, on the ship having afterwards got on shore, to communicate that fact, which he might have done by the same post, was held fatal to the insurance. Ashurst, J., observes: "On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted that the principal

(1) 1 T. R. 12, 16.

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knows whatever the agent knows. And there is no hardship on the plaintiff: for if the fact had been known the policy could not have been effected." Buller, J., says: "Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. Here it appears that the plaintiff trusted Thomas (the agent), and he must therefore take the consequences."

In the case of *Gladstone* v. *King* (1), which was an action on a policy on a ship, "lost or not lost," the master had omitted to communicate, when writing to his owners, the fact of the ship having been driven on a rock, a fact as to which, on arriving at the port of discharge, he made a protest, detailing the accident, and stating that the ship's bottom must have been chafed; and the owners, in ignorance of the accident, had effected an insurance. On these facts it was held that the captain was bound to communicate the fact, and, for want of such communication, the antecedent damage was an implied exception from the insurance, and the plaintiffs could not recover the loss arising from the repairs rendered necessary by the accident. "If," says Lord Ellenborough, "the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent; by which means the underwriter at the time of subscribing the policy would incur a certainty of being liable for an antecedent average loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew, and might have actually communicated to the plaintiffs, the cause of damage, so as to have apprised them of it before the time of effecting the policy, I think that no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience; and there being no fraud imputed to the captain in the concealment will not alter the case."

An eminent authority, the late Mr. Justice Story, has, however,

(1) 1 M. & S. 35, 38.

declined to be bound by these decisions. In a case (1) tried before him on a policy of insurance effected after a total loss, where the master had omitted to give intelligence of the loss to his owner, with the fraudulent design of enabling him to make an insurance, and the insurance had been effected by the owner in ignorance of the loss, that learned judge held that, as the owner at the time of procuring the insurance had no knowledge of the loss, but acted with an entire good faith, he was not precluded from recovering, and that the policy was not rendered void by the omission of the master to communicate intelligence of the loss, although such omission was wilful and fraudulent. The case being taken to a court of error (2), the latter upheld the decision; not, indeed, on the grounds taken by Mr. Justice Story, but on the very unsatisfactory, and, as we think, untenable ground, that by the total loss of the vessel the master had wholly ceased to be the agent of the owner, and had become the agent of the underwriters. From the language of the judgment, it may be inferred that if the Court had considered that the relation of the master to his owners had not been interrupted by the loss of the vessel, they would not have upheld the decision appealed from. The ruling of Mr. Justice Story has been discussed by Mr. Duer, in his admirable work on insurance (3), and we think the reasoning of the learned writer fully establishes his conclusion as to the ruling having been erroneous. Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of opinion that the cases of *Fitzherbert* v. *Mather* (4) and *Gladstone* v. *King* (5) were well decided; and that if an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of busi-

(1) *Ruggles* v. *General Interest Insurance Company*, 4 Mason's Rep. 74.
(2) 12 Wheaton, 408.
(3) Vol. ii. p. 418.
(4) 1 T. R. 12.
(5) 1 M. & S. 35.

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ness, ought to have knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it.

It has been said, indeed, that a party desiring to insure is entitled, on paying a corresponding premium, to insure on the terms of receiving compensation in the event of the subject matter of the insurance being lost at the time of the insurance, and that he ought not to be deprived of the advantage, which he has paid to secure, by the misconduct of his agent. But to this there are two answers: First, that, as we have already pointed out, the implied condition on which the underwriter undertakes to insure—not only that every material fact which is, but also that every fact which ought to be, in the knowledge of the assured shall be made known to him—is not fulfilled; secondly, as was said by the Court in *Fitzherbert* v. *Mather* (1), where a loss must fall on one of two innocent parties through the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed.

By thus holding, we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance, in matters on which they ought to communicate information to their principals, as also any tendency on the part of principals to encourage their servants and agents so to act. For these reasons our judgment must be for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Slater & Dommett.*
Attorneys for defendant: *Pearce, Phillips, & Pearce.*

(1) 1 T. R. 12, 16.

BAKER *v.* STEPHENS. 1867 *May* 29.

Arbitration—Time for Making Award under the Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 15—"*Entering on a Reference.*"

By s. 15 of the Common Law Procedure Act, 1854, the arbitrator, acting under any document or compulsory order of reference, or under any order referring the award back, shall make his award, if no other time is fixed, "within three months after he shall have been appointed and shall have entered on the reference."

An award was referred back by rule of court on the 12th of June, 1865; the arbitrators, on the 5th of October (having previously made an appointment, which the defendant did not attend), appointed the 19th of October to proceed peremptorily and ex parte, if either of the parties did not attend; the defendant made an excuse for not attending, and the arbitrators, thinking the excuse valid, made a fresh peremptory appointment for the 31st of October. The defendant did not attend, and the arbitrators then took the plaintiff's evidence; and after further notice proceeded with the reference, the defendant still refusing to attend; and they made their fresh award on the 6th of January, 1866:—

Held, that the award was made in time: for that an arbitrator enters on a reference, not when he accepts the office, or takes upon himself the functions of arbitrator by giving notice of his intention to proceed, but when he enters into the matter of the reference, either with both parties before him, or under a peremptory appointment enabling him to proceed ex parte.

FIRST COUNT, on an award, stating that on an action being brought the matters in difference were referred by a judge's order to two arbitrators; that they made an award, and that it was by rule of court remitted to the arbitrators for reconsideration, and they afterwards made their fresh award, affirming the first.

Fourth plea, that the rule of court ordering the award to be remitted was made on the 12th of June, 1865, and the arbitrators did not make the further award within three months after the date of the said order and after entering on the reference.

Issue thereon.

There were other counts and pleadings which are immaterial.

At the trial before Blackburn, J., at the sittings in Middlesex during Michaelmas Term, 1866, the plaintiff had a verdict for the amount claimed, with leave to the defendant to move to reduce the verdict by the amount of the award, if the Court should think the fourth plea proved on the following facts:—

The defendant was a builder, and had been employed to repair a house of the plaintiff, and after the repairs were done a dispute

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arose as to the cost, and an action having been brought, the matters in difference were by consent referred, under a judge's order of the 5th of May, 1864, to two surveyors, one appointed by each party. The arbitrators made their award, on the 3rd of May, 1865, for the full amount of the plaintiff's claim; but on motion by the defendant to set aside the award, on the ground that the arbitrators had examined the plaintiff on oath in the absence of the defendant and without any notice to him, the rule was made absolute on the 12th of June, 1865, "that the award be remitted to the arbitrators for their reconsideration and determination."

Both the arbitrators were ready and willing to proceed, but the defendant's attorneys were anxious to have fresh arbitrators, and some correspondence ensued. On the 29th of July, one of the arbitrators, writing for both, gave notice to both parties of their intention to meet on the 8th of August to reconsider the case. The defendant's attorneys wrote, saying they could not attend on that day, and the arbitrators and the plaintiff's attorney attended, and the defendant's attorneys not appearing, the arbitrators determined not to proceed; and as the vacation had commenced, nothing further was done till the 5th of October, on which day the arbitrators, being pressed by the plaintiff, signed a formal notice, which was served on the attorneys of the plaintiff and defendant, that they appointed the 19th of October peremptorily to proceed with the reconsideration of their award, pursuant to the rule of court of the 12th of June; and that if either party should, without reasonable excuse, fail to attend such appointment, they should proceed ex parte. The defendant's attorneys did not attend on the 19th of October, alleging, amongst other reasons, that their counsel was out of town, and the arbitrators accordingly did not proceed on that day, but they then signed and sent a fresh notice for the 31st of October similar to the former. On the 31st of October, after waiting an hour for the defendant's attorneys, who did not attend, the arbitrators proceeded to take the plaintiff's evidence, a copy of which they forwarded to the defendant's attorneys. Some further notices were given, and a correspondence ensued; but the defendant's attorneys never attended, and after considerable delay caused by their proceedings, and after protest from them, the

arbitrators, on the 6th of January, 1866, made a fresh award, affirming their former award.

A rule having been obtained pursuant to the leave reserved, on the ground that the award was void, not having been made within three months pursuant to s. 15 of the Common Law Procedure Act, 1854 (1),

J. D. Coleridge, Q.C., and *Hannen*, shewed cause. The award was made within the three months. The arbitrators did not "enter on the reference" till the 31st of October, when they proceeded to enter upon the matter by taking the plaintiff's evidence. At all events, the mere sending the notice on the 5th of October was not entering on the reference, and the award was made within three months of the meeting on the 19th of October. Secondly, the delay having been caused by him, the defendant is precluded from saying the award was not made within the time: *Andrews* v. *Elliott* (2); *Tyerman* v. *Smith*. (3)

[BLACKBURN J. Here the defendant never went before the arbitrators.]

Pollock, Q.C., and *Nasmith*, in support of the rule. On a reference back, the time must run from the date of the order. But if not, the arbitrators "entered on the reference" the moment they assumed to act as arbitrators. They met, and exercised the functions of arbitrators on the 29th of July and 8th of August, and again on the 5th of October. The correspondence shews that the arbitrators assumed to act, though the defendant's attorneys were unwilling that they should resume their functions, and the arbitrators therefore entered on the reference from the first. The defendant is not estopped; he has never submitted himself to the jurisdiction of the arbitrators; and the cases cited do not apply.

(1) 17 & 18 Vict. c. 125, s. 15 "The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party," &c.

(2) 5 E. & B. 502; S. C. in Ex. Ch. 6 E. & B. 338; 25 L. J. (Q.B.) 336.

(3) 6 E. & B. 719; 25 L. J. (Q.B.) 359.

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[BLACKBURN, J. It all comes round to the question whether making an appointment is "entering on the reference."]

COCKBURN, C.J. I am of opinion that this rule must be discharged. The question turns on the construction of s. 15 of the Common Law Procedure Act, 1854, as applicable to this case, in which the award was made and referred back by the Court for reconsideration. And the question is, from what period do the three months run? The words of the section are somewhat ambiguous, but the only sound construction appears to me to be that the three months must date from the time the arbitrator actually enters upon the reference: not from the time that he merely takes upon himself the office of arbitrator by accepting the reference, but from the time he takes upon himself and exercises the functions of arbitrator. The same construction must apply where the award is referred back, and the time will run, not from the date of the order or rule referring the matter back, but from the date when the arbitrator enters upon the matter with a view to reconsider the award in obedience to the rule.

BLACKBURN, J. I am of the same opinion. The question turns entirely on s. 15. Now, "after he shall have been appointed," cannot mean after the original appointment, but from the time of the order referring the matter back to the arbitrator; otherwise in such a case the three months might and most probably would have elapsed before, in fact, it could have begun to run. Then the section goes on, "*and* shall have entered on the reference," both are to concur before the time is to begin to run.

Now, the first contest on behalf of the defendant was, that "entered on the reference" must mean having accepted the office, and if that were the meaning, then, in the present case, the arbitrators being willing to proceed in July, they would have then accepted the office and entered on the reference, and the award would have been made too late. But, I think, the words do not mean that, the alternative, "or shall have been called upon to act," shews this, for that implies that the arbitrator has already accepted the office; it is plain, therefore, as it seems to me, that entering upon the reference means something else than merely

accepting the office. Then if it does not mean merely accepting the office, what does it mean? It is quite possible to construe the phrase so as to suit the defendant's case. Here the arbitrators gave a notice of their intention to proceed peremptorily; and no doubt this was, so far, a step in the reference, and gave them a right to proceed and decide ex parte if both parties did not appear; and it is something like the issuing of a writ; therefore, it might be said that the arbitrators entered on the reference on the 5th of October, in which case, also, the award would be out of time.

But the words "entering on the reference" may also bear the meaning of beginning to hear the parties; and it is very reasonable and proper that time should be given for preparation before proceeding with the reference; frequently, also, a good deal of time is lost before the actual commencement of the business of the reference; and it might very well be that the whole three months might elapse before this, when the parties, or one of them, are unwilling to go on. And on the whole I think the latter is the true construction of the section; and as the arbitrators did not do anything beyond giving notice until after the 5th of October, I think they did not enter on the reference until after that day, and consequently that the award, having been made on the 6th of January, was made within three months after the arbitrators had been appointed and had entered on the reference; and the rule must therefore be discharged.

MELLOR, J. I am of the same opinion. The words of the section, as to the limitation of time, are more applicable to the original order of reference; but they seem intended to apply also to the case of referring back an award by rule of court. And I think we shall best give effect to the section by holding that "entering on the reference" means something more than giving notice, especially when the arbitrator is to re-enter upon the matter; and that until the parties are before him, or until he proceeds ex parte, he has not entered on the reference; and that the mere giving notice that he will enter on the reference with both parties before him, or will proceed ex parte, is not an entering on the reference.

SHEE, J. The object of the section is to limit the time for

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making an award in cases in which the parties have not by the agreement or order stated any time; it also has the same object in cases where the order referring a matter back had not mentioned any time. And the three months "after he shall have been appointed" must be taken first in the sense of the original appointment, and secondly in the sense of a reference back; but then the section says, "*and* shall have entered on the reference," so that the time is extended beyond the mere date of the appointment or reference back; and the question is, what is the meaning of "entering on the reference?" I think it means the beginning the real business of the reference by holding a meeting of the parties, or proceeding under a peremptory appointment ex parte. And on this construction the award was made in time.

Rule discharged.

Attorney for plaintiff: *F. Carlon.*
Attorney for defendant: *A. J. Miles.*

June 5.

BAUMAN, APPELLANT; THE VESTRY OF ST. PANCRAS, RESPONDENTS.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—"*General Line of Buildings*"—*Certificate of Superintending Architect, when to be given.*

The appellant having premises in a street, the original line of houses being some distance from the highway, with a forecourt in front, applied to the Metropolitan Board of Works, under 25 & 26 Vict. c. 102, s. 75, for leave to erect a building on this forecourt; the board granted a consent conditioned that the building was not erected higher than the next adjoining; this consent the appellant never took up, but he erected a building higher than the next adjoining. The vestry of the parish then made complaint before a magistrate, charging that the appellant had erected a building beyond the general line of buildings, contrary to the conditions of consent of the board, and in contravention of s. 75. The day before the hearing of the complaint, the superintending architect of the board certified that the "original line of buildings" was the "general line of buildings." The magistrate held the complaint proved, and ordered that the appellant should demolish so much of the building as was beyond the general line of buildings fixed by the architect:—

Held, that the order was right.

St. George, Hanover Square v. *Sparrow* (16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118) discussed.

CASE stated by one of the metropolitan police magistrates, under 20 & 21 Vict. c. 43.

The appellant appeared on the 20th of December, 1866, to answer to the complaint of the assistant district surveyor of the parish of St. Pancras, on behalf of the vestry of that parish.

The summons charged that the appellant, being the owner of premises known as 316, Euston-road, had erected a building beyond the general line of buildings in the street, the distance between such line of building and the highway being not in excess of fifty feet, contrary to the terms and conditions on which the consent of the Metropolitan Board of Works was obtained, and in contravention of the statute 25 & 26 Vict. c. 102, s. 75. (1)

It appeared in evidence that the original line of buildings in that part of Euston Road where the appellant's premises lie, was at some little distance from the highway, thus leaving a small vacant space, or forecourt, in front of each house. Of late years many of these forecourts have been built upon, thus making a new line of frontage of buildings. There are likewise some old houses

(1) 25 & 26 Vict. c. 102, s. 75, after repealing s. 143 of 18 & 19 Vict. c. 120, and s. 140 of 7 Geo. 4, c. 142, enacts that "No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable." The section then provides that, in the event of the order not being obeyed, the vestry or board may enter and demolish the building, &c.

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at the eastern end which project beyond the original line of building. The superintending architect of the Metropolitan Board of Works stated that on the day before the hearing of the summons he had decided what has above been called "the original line of buildings" to be the "general line of buildings."

On the 27th of November, 1865, the appellant had made, or caused to be made, an application in writing to the Metropolitan Board of Works for leave to erect on the forecourt of his premises a building of ground-floor, first-floor, and second-floor; and on the 15th of December following permission was granted by the board in the usual form to build a house not exceeding in height the house built on the adjoining shop westward. The appellant, however, did not apply to accept the conditions, and has since built up the house two stories higher than the shop to the westward above mentioned. The building of the appellant was still in the process of erection on the 3rd of August, 1866, and the whole time of its construction occupied six months.

After hearing the parties, the magistrate was of opinion that the superintending architect had sufficiently decided upon the general line of buildings, though he had not done so at an earlier date than on the day before the summons was heard; and the magistrate was further of opinion that the form of summons was right, in that it charged the appellant to have erected a building contrary to the condition on which the consent of the Metropolitan Board of Works was obtained, although the appellant had not taken up the conditions, and therefore might not have been aware what the conditions were; and that it was not necessary that the respondents should have adopted a form of summons charging the appellant to have built without the consent of the Metropolitan Board of Works. The magistrate ordered that the appellant should demolish so much of the building as is beyond the general line aforesaid fixed and decided by the superintending architect, and, in default thereof, that the vestry of the parish should enter the premises and do whatever might be necessary to execute the order.

If the Court should be of opinion that the general line of buildings was sufficiently fixed and decided by the superintending architect of the Metropolitan Board of Works on the day

previous to the hearing of the summons, and that it was rightly charged that the appellant had erected the building contrary to the condition on which the consent of the Metropolitan Board of Works was obtained, though such condition may not have been known to the appellant, the order was to remain in force.

Le Breton, for the respondents. The order was perfectly right. The question turns entirely on s. 75 of the 25 & 26 Vict. c. 102. It is only on the line determined by the architect that the magistrate can act; and if the owner of premises chooses to build beyond what is evidently or even doubtfully the general line of buildings, without obtaining the sanction of the Metropolitan Board, he must take the consequences, if it afterwards turns out that the architect fixes the general line so as to make the new erection beyond it.

[MELLOR, J., referred to *St. George, Hanover Square* v. *Sparrow*. (1)]

That case is not very intelligible, but all that it can be said to decide is, that the magistrate was not bound to make the order. In the present case the magistrate has made the order, and the very circumstances of the case rendered it necessary that the certificate of the architect should be given, and it is immaterial when it is given.

J. C. F. S. Day, for the appellant. There can be no offence until the line has been determined; and in common justice a man cannot be convicted of an offence in doing what was not forbidden at the time he did it. Secondly, the magistrate acted simply on the certificate of the surveyor (2), which was not sufficient; he was bound to satisfy himself that the building was erected beyond the general line of building: *St. George, Hanover Square* v. *Sparrow*. (1)

COCKBURN, C.J. I am of opinion that the magistrate's decision was right. There seems to be no doubt that the appellant has built beyond the general line of buildings in the street. He had applied for the consent of the Metropolitan Board of Works, under

(1) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118, 10 Jur. N.S. 771

(2) Whether or not there was a certificate in writing does not appear in the case; the point was noticed in the argument but not insisted on, as it was not taken before the magistrate or raised by the case.

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s. 75, to his erecting a building in the forecourt, and obtained it, conditionally that he did not raise the building to a greater height than the next building westward; he, however, had gone beyond that. Complaint is then brought by the vestry before the magistrate, and the question is, whether the order made by the magistrate was rightly made, under s. 75. That section, properly understood, seems to amount to this: it shall be an offence to build "beyond the general line of buildings" without the consent of the Metropolitan Board of Works; and if there be any dispute as to what is "the general line," that is to be decided by the superintending architect of the Metropolitan Board of Works. If the architect is of opinion that the building proposed will go beyond the line, then it becomes an offence to erect it. If it be erected, the vestry may go before a magistrate, and get the building pulled down. It may be, no consent has been asked, and the line has not been brought to the notice of the board or the architect; but a building has been erected which it is contended goes beyond the general line of buildings; complaint is then made, and the magistrate is called upon to order the demolition of the building—with reference to what? He is to make an order "directing the demolition of such building, or so much thereof as may be beyond the general line *so fixed as aforesaid.*" The latter part of the sentence is referable only to the certificate of the superintending architect; no other line or mode of determining the line is mentioned. It appears to me that the learned judges in the Court of Common Pleas, in holding that it was competent to the magistrate to fix and determine a general line different from that determined by the architect, overlooked the important fact, that it is the line fixed by the architect which gives the magistrate jurisdiction to determine whether or not the erection of the building is an offence, and that the magistrate has no jurisdiction except with reference to that line. If the magistrate were convinced that that line was wrong, he could not order the demolition with respect to a line fixed by himself. I cannot therefore consent to be bound by the case in the Common Pleas.

I am of opinion that the magistrate was perfectly right in receiving the statement of the architect, however tardily it may have been given, conceiving, as I do, that the architect's deter-

mination was necessary as the foundation of the magistrate's jurisdiction to decide, ay or no, was the building an offence.

MELLOR, J. I entirely agree with the construction put by the Lord Chief Justice on s. 75. It is ill-penned, but when one comes to look at what the object of it is, there appears to be no incongruity in supposing that the power of fixing the line was in the superintending architect absolutely. There are two things to be decided—the line, and whether the building is beyond it; the architect fixes the line, and the magistrate then decides, if it be proved to his satisfaction, how much of the building is beyond the line so fixed. The magistrate would have difficulty in saying what is the general line, not having the requisite technical knowledge, whereas the architect has this knowledge; and the magistrate, accepting the line fixed by the architect as the datum on which he is to act, is to determine how much is beyond the line, and how much is to come down. We thus get an intelligible construction of the section: what may be called the architectural part of the matter is left to the architect, and the fact constituting the offence of how much is beyond the line to the magistrate. It is difficult to see exactly what was meant by the statute. It was suggested that the architect is to fix for all time the general line along the whole length of street; but that, at any rate, cannot be the law. The magistrate must examine into the matter, and no doubt the architect must decide from time to time as occasion arises.

SHEE, J. I also think the decision of the magistrate was right. He ordered so much of the building to be demolished as is beyond the general line fixed by the superintending architect. It seems quite clear that what the appellant had done was contrary to the enactment of s. 75, and that the magistrate, under the circumstances, had power to make the order. It does not seem to me that, in so deciding, we are necessarily in conflict with the Court of Common Pleas. In the case before that Court the general line had been ascertained by the architect, and the magistrate declined to accept that line, but thought that another line would have been more proper, and he refused to make any order, both on that

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ground, and because he thought "the thing" was not an "erection" within the meaning of the section; and the Court held that he was not bound to make an order. It is clear that the magistrate's power is limited to ordering the demolition of so much of the building complained of as is beyond the line "so fixed as aforesaid," and therefore his order must be confined to a demolition of what goes beyond the line fixed by the architect; it must be proved to his satisfaction that the complaint is well founded, and so far he has a discretion; but he cannot decide, except with reference to the line fixed by the architect. All that the Common Pleas really decided was, that the magistrate was not bound to convict merely because something had been put protruding beyond the line fixed by the architect.

Order affirmed. (1)

Attorneys for appellant: *Routh & Stacey.*
Attorney for respondents: *W. D. Cooper.*

June 29.

POULTON *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Master and Servant—Railway Company, liability of, for acts of their Servants—Evidence of implied Authority—Arrest of Passengers—8 *Vict. c.* 20, *ss.* 97, 103, 104.

The plaintiff, having taken a horse to an agricultural show by the defendants' railway, was entitled under arrangements advertised by the defendants to take the horse back free of charge on the production of a certificate. The plaintiff accordingly produced a certificate, and the horse was put into a box without payment or booking, and the plaintiff having taken a ticket for himself proceeded by the same train. At the end of the journey the station master demanded payment for the horse, and the plaintiff, refusing to pay, was detained in custody by two policemen under the orders of the station master, until it was ascertained by telegraph that all was right. An action having been brought against the defendants for false imprisonment:—

Held, that a railway company has power to apprehend a person travelling on the railway without having paid his own fare, but has power only to detain the goods for nonpayment of the carriage; consequently, as the defendants themselves

(1) The Court, on the application of the appellant, suspended the formal entry of their judgment, with a view to arrangement.

would have had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the station master to detain the plaintiff on this assumption, and they were, therefore, not liable for this act of the station master.

Goff v. *Great Northern Railway Company* (30 L. J. (Q.B.) 148; 3 E. & E. 672), and other cases, distinguished on this ground.

DECLARATION, that the defendants, by their servants, assaulted the plaintiff, and gave him into the custody of a policeman, and caused him to be imprisoned.

Plea, not guilty.

At the trial before Kelly, C.B., at the Hants spring assizes, it appeared in evidence, that the plaintiff, having the care of a horse, had taken it by the defendants' railway to an agricultural show held at Salisbury, in June, 1866. Under the railway arrangements advertised by the defendants, horses were to be taken to Salisbury at the usual rates; "on return free, if remaining unsold, on production of certificate to that effect." After the show the plaintiff produced the proper certificate to the defendants' servants, and the horse was put into a horse-box without any payment or booking, and the plaintiff having taken a third class ticket for himself travelled by the same train. On his arrival at his destination, Romsey Station, the plaintiff gave up his ticket and the certificate to a porter, and was taking the horse away along the road, when the station master sent after him and demanded 6*s.* 10*d.* for the carriage of the horse, under a mistaken notion that the horse could not be carried free by that train. On the plaintiff explaining the circumstances and refusing to pay, he was detained and taken back to the station by two policemen, acting under the orders of the station master. After the plaintiff had been detained half an hour, the station master telegraphed to Salisbury, and on receipt of a telegram in reply, "all right," the plaintiff was allowed to proceed.

The jury returned a verdict for the plaintiff for 10*l.*, leave being reserved to move to enter the verdict for the defendants.

A rule having being obtained accordingly, on the ground that the station master had no authority from the defendants to take the plaintiff into custody,

June 28. *Prideaux, Q.C.*, and *Lopes*, shewed cause. The de-

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fendants, a railway company, can only act by their servants; the station master was the person in authority, and it must be assumed that he had authority to do all which the exigency of the business requires, and the defendants, therefore, are bound by his act in detaining the plaintiff: *Goff* v. *Great Northern Railway Company*. (1)

[BLACKBURN, J. In that case there *was* a power to arrest, on the assumption that the facts were as the officer arresting supposed; here there is no such power. That distinction is kept in view in the judgment in that case, and was expressly made by an alteration in the judgment suggested by Sir Hugh Hill, which certainly made the judgment more strictly accurate.]

The arrest in that case was founded on the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 103, 104 (2), which gives power to detain a person travelling on a railway without having paid "his fare." The plaintiff and his horse travelled by the same train, and it may well be that the payment for the carriage of the horse and himself may be treated as one contract, so that the carriage of the horse is part of the plaintiff's fare. But putting aside that contention, the station master is placed in a position of authority by the defendants, and he must be taken to have full authority to exercise his discretion as to law or fact; and the defendants must be held liable for his acts done so far in the course of his duty as to be for their benefit, just as if they had done the acts themselves: *Seymour* v. *Greenwood* (3); *Wilson*

(1) 30 L. J. (Q.B.) 148; 3 E. & E. 672.

(2) 8 Vict. c. 20, s. 103: "If any person travel, or attempt to travel, in any carriage of the company . . . . . without having previously paid *his fare*, and with intent to avoid payment thereof," . . . . he "shall for every such offence forfeit a sum not exceeding 40s."

s. 104: "If any person be discovered either in or after committing, or attempting to commit, any such offence, as in the previous enactment mentioned, all officers and servants, and other persons on behalf of the company, ... and all constables, gaolers, and peace officers may lawfully apprehend and detain such person until he can conveniently be taken before some justice, or until he be otherwise discharged by the course of law."

s. 97: "If on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods," restoring the overplus to the person entitled.

(3) 30 L. J. (Ex.) 189; 6 H. & N. 359.

v. *Lancashire and Yorkshire Railway Company*; *Farren* v. *The Same*. (1)

[BLACKBURN, J. In *Seymour* v. *Greenwood* (2), in the Exchequer Chamber, Williams, J., delivering the judgment of the Court, says: "It is urged that, though it cannot be denied, that the defendant authorized his guard to superintend the conduct of the omnibus generally, and that that authority must include an authority to turn out any passenger who misconducts himself, yet that it gives no authority to turn out an unoffending passenger. But by giving the guard authority to turn out an offending passenger the defendant necessarily gave him also authority to judge for himself who should be considered an offending passenger." That is in exact accordance with *Goff* v. *Great Northern Railway Company*. (3)]

It is a very fine distinction to say that the master is liable for a mistake of facts, but not for a mistake of law, when the servant is strictly acting in his master's service.

[BLACKBURN, J. It has been decided in the Exchequer Chamber, in the somewhat analogous case as to notice of action, that a bonâ fide mistake of facts entitles the defendant to the protection of the statute, but not when, on the given state of facts, the defendant was mistaken in law. (4)]

In *Seymour* v. *Greenwood* (5), Martin, B., puts the criterion of the liability of the master to be, not whether the master has given the authority to do the particular act, but whether the servant does it in the ordinary course of his employment. So in *Limpus* v. *London General Omnibus Company* (6), the act upon which the master was held liable was in direct violation of his orders, but was in the course of the servant's employment.

H. T. Cole, Q.C. (*Pinder* with him), in support of the rule, cited *Roe* v. *Birkenhead &c. Railway Company* (7); and *Cox* v. *Midland Railway Company*. (8)

(1) 27 L. T. 204.

(2) 30 L. J. (Ex.) at p. 328; 7 H. & N. at p. 358.

(3) 30 L. J. (Q.B.) 148; 3 E. & E. 672.

(4) See *Roberts* v. *Orchard*, 2 H. & C. 769; 33 L. J. (Ex.) 65.

(5) 30 L. J. (Ex.) at p. 192; 6 H. & N. at p. 365.

(6) 32 L. J. (Ex.) 34; 1 H. & C. 526.

(7) 21 L. J. (Ex.) 9; 7 Ex. 36.

(8) 3 Ex. 268; 18 L. J. (Ex.) 65.

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[*Prideaux*, contrà, called attention to *Walker* v. *Great Western Railway Company* (1), and the Court then adjourned.]

June 29. BLACKBURN, J. I do not think we need trouble the defendants' counsel any further. There being no doubt whatever that the station master did give the plaintiff into custody and that that was false imprisonment, the only question is whether there was evidence that the station master was clothed with authority; that his act in detaining the plaintiff in custody was within the scope of his authority, and was such as that the evidence before the jury would properly convince them that he was authorized on the part of the company to do the wrongful act, and consequently that the company were responsible.

There can be no question since the decision of the case of *Goff* v. *Great Northern Railway Company* (2), that where a railway company or any other body (for it does not matter whether it is a railway company or not), have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all those things on their behalf which are right and proper in the exigencies of their business,—all such things as somebody must make up his mind, on behalf of the company, whether they should be done or not; and the fact that the company are absent, and the person is there to manage their affairs, is primâ facie evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake, or commits an excess, while acting within the scope of his authority, his employers are responsible for it.

In the present case the station master took the plaintiff into custody, because, as he erroneously supposed, the plaintiff had improperly not paid the fare for a horse that had been carried on the defendants' railway. Had the station master given him into custody under the erroneous supposition that he had not paid his own fare for carrying himself, as an individual, then, inasmuch as there is an authority by the act of parliament (3) to arrest and take into custody any person who does not pay

(1) Law Rep. 2 Ex. 228.
(2) 30 L. J. (Q.B.) 148; 3 E. & E. 672.
(3) 8 Vict. c. 20, ss. 103, 104, ante, p. 536.

his fare, and, consequently, the act would have been an act which the railway company were authorized to do, it might be said that the station master, being the head man on the spot, had authority to take into custody those who did not pay their fares; and, if he made a mistake, it was a mistake in doing a thing which the railway company had given him authority to do, and then the railway company would be responsible. But what the plaintiff was given into custody for was the not paying the money for carrying the horse. There was an attempt by the counsel for the plaintiff to argue that that was part of "his fare," within the meaning of the act of parliament; but we think that is untenable. The act of parliament enacts, in very careful words, that where a passenger does not pay his fare, he may be taken into custody (1), and that where goods are not paid for, they may be detained. (2) Where a person does not pay for a horse, and he is himself a passenger in the train, it would be an abuse of language to say the money for the horse was part of "his fare."

Then comes the question we have to determine: can there be said to be any evidence from which it may be inferred that the railway company authorized the station master to do an act which it appears, on every view of the facts, he would be utterly unauthorized to do? We think not: we do not think it is within the scope of his authority, in what he was authorized to do, so to bind the company. It was an act out of the scope of his authority, and for which the company would be no more responsible than if he had committed an assault, or done any other act which the company never authorized him to do.

There is little need to refer to the cases, they all have this same distinction. In *Goff* v. *Great Northern Railway Company* (3) the act was the arresting a man for the benefit of the company, where there was authority to arrest a passenger for travelling without paying his fare, and the Court thought, and no doubt rightly, that the station master and the policemen who were employed there must be assumed to be authorized to take people into custody whom they believed to be committing the act, and if there was a mistake, it was a mistake made within the scope of their authority.

(1) ss. 103, 104, ante, p. 536. (2) s. 97, ante, p. 536.
(3) 30 L. J. (Q.B.) 148; 3 E. & E. 672.

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In *Seymour* v. *Greenwood* (1), in the Exchequer Chamber, Sir E. V. Williams, in delivering the judgment of the Court, points out very distinctly that the conductor was authorized to remove a disorderly passenger; that that was part of his authority; and when, in removing a passenger whom he thought to be disorderly, he used more violence than was necessary, he was doing a thing within the scope of his authority.

In *Limpus* v. *London General Omnibus Company* (2) where the question was, whether or not the direction of my Brother Martin to the jury was erroneous, there was a difference of opinion. The late Mr. Justice Wightman thought it was: that the learned judge had gone too far to make the company liable; the other judges thought there was no misdirection, and that the act done by the driver was within the scope of his authority, though, no doubt, it was a wrongful and improper act, and therefore that his masters were responsible for it.

In the present case an act was done by the station master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station master any power, to do the act. Therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station master personally, but not against the railway company.

MELLOR, J. I am entirely of the same opinion. I think the distinction is clear; it limits the scope of authority, to be implied from the fact of being the station master, to such acts as the company could do themselves, and I cannot think it ever can be implied that the company authorized the station master to do that which they have no authority to do themselves: and that seems to me to be the boundary line. It was well put by the counsel for the plaintiff, and no doubt there is a difficulty at first in seeing where the distinction begins and where it ends; but I cannot help thinking it is analogous to an action against magistrates.

(1) 30 L. J. (Ex.) at p. 328; 7 H. & N. at p. 358.

(2) 32 L. J. (Ex.) 34; 1 H. & C. 526.

If the station master had made a mistake in committing an act which he was authorized to do, I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station master acts in a manner in which the company themselves would not be authorized to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different; and I think that is the distinction on which the whole matter turns. So if a magistrate acts within the scope of his authority, however erroneously he judges of the facts, he is protected; but the moment he assumes a jurisdiction over a matter which does not belong to him, then an action lies. It is a kindred distinction, and I only refer to it for the sake of illustration.

SHEE, J. I am of the same opinion. As pointed out by my learned Brothers, an authority cannot be implied to have been given to a servant to do an act, which, if his master were on the spot, the master would not be justified in doing, on the assumption of a particular state of facts. It is clear, from the construction of s. 103 of 8 Vict. c. 20 (1), that the company had no power to arrest this passenger because he had not paid the price for the carriage of his horse.

Rule absolute.

Attorneys for plaintiff: *Smith, Fawdon, & Low, for Low & Son, Portsea.*

Attorney for defendants: *L. Crombie.*

(1) Ante, p. 536.

1867 THE QUEEN, on the Prosecution of THE OVERSEERS OF BOXFORD,
July 9. and Others, Respondents; *v.* WELLS, Appellant.

Poor-rate—Rateable Value—Allowance for Repairs where Tenant does them—Allowance for future renewal of Buildings and Machinery—6 & 7 *Wm.* 4, *c.* 96, *s.* 1.

In assessing premises to the poor-rate the rent actually paid was taken as the "gross estimated rental," this was a fair and bonâ fide rent on the terms that the landlord should find the chief materials for repairs and the tenant the other materials and cost of labour:—

Held, that, in order to arrive at the rateable value, the cost of the repairs borne by the tenant ought not to be deducted.

Semble, that, in assessing farms with farmhouses and buildings and a water corn mill to the poor rate, an allowance ought, in general, to be made in respect of the contingent or future renewal of buildings and machinery.

On an appeal to the Berkshire quarter sessions against a poor rate for the parish of Boxford (in which the Reverend George Wells was appellant, and the overseers of Boxford, John Pargiter, and others, and the assessment committee of the Newbury Union, were respondents), the sessions affirmed the rate subject to a case.

The following is an extract from the rate book of the material parts of the assessments which were the subject of appeal (1):—

Name of Occupier.	Description of Property rated.	Gross Estimated Rental.			Rateable Value.		
		£	*s.*	*d.*	£	*s.*	*d.*
Pargiter, John	House and land	270	0	0	243	0	0
Ditto	Ditto	70	0	0	63	0	0
Clark, Joseph	Ditto	254	0	0	228	12	0
Matthews, Richard . . .	Land and wood	7	5	0	6	10	6
Ward, John Webb . . .	House and corn mill	100	0	0	60	0	0
Baverstock, Frederick . .	House and land	40	0	0	36	0	0
Ditto	Ditto	97	0	0	87	6	0

1. The sums which appear in the column headed "gross estimated rental" are the actual rents paid by the occupiers whose names appear against them respectively, and are fair and bonâ fide rents, and represent the rents at which the hereditaments might reason-

(1) The ground of appeal is not stated in the case; but it appears to have been that Pargiter and the other occupiers were under-rated.

ably be expected to let from year to year, upon the customary terms between landlord and tenant, that is to say, in the case of the properties the subject of the present appeal, the landlord paying the insurance, and providing timber, bricks, tiles, and lime, for repairs, and the tenant carting such materials and providing all other materials for such repairs, including straw for thatching, and paying the cost of the labour for doing such repairs and thatching, and also paying all usual tenants' rates and taxes, and the tithe commutation rentcharge. (1)

2. The total average annual outlay which is required in respect of the premises the subject of the present appeal, as the probable average annual cost of the repairs, insurance, and other expenses necessary to maintain them in a state to command the before mentioned rents, is according to the scale following:—

1. Dwelling houses	£20	0	0	per cent.
2. Farms with farm houses and buildings	14	16	7	„
3. Lands without farm houses and buildings	3	10	0	„
4. Water corn mills	22	11	6	„

3. Of this total outlay the proportions borne respectively by the landlord and tenant under the above terms of tenancy are as follows:—

	Landlord. Per cent.			Tenant. Per cent.
1. Dwelling houses	£20	0	0	£0
2. Farms with farm houses and buildings	10	6	7	4
3. Lands without farm houses and buildings	1	10	0	2
4. Water corn mills	19	11	6	5

4. In the cases of the first, second, and fourth items, the percentages set forth in the above second paragraph include allowances in respect of any contingent or future renewal or reconstruction of buildings and machinery. If, however, no such allowance

(1) It is nowhere stated in the case how the rateable value was arrived at; but it would appear to have been by allowing *all* the deductions claimed by the respondents in paragraph 6.

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ought to be included, then the above scale is to stand reduced as follows:—

	Landlord. Per cent.	Tenant. Per cent.
1. Dwelling houses	£15 18 5	£0
2. Farms, with farm houses and buildings	7 8 6	4
4. Water corn mills	13 0 0	5

If such allowances ought to be included in respect of buildings only, the percentage should stand as follows:—

	Landlord. Per cent.	Tenant. Per cent.
1. Dwelling houses	£20 0 0	£0
2. Farms with farm houses and buildings	10 6 7	4
4. Water corn mills	15 0 0	5

If such allowances ought to be included in respect of the reconstruction or renewal of the machinery only, the percentage should be:—

	Landlord. Per cent.	Tenant. Per cent.
1. Dwelling houses	£15 18 5	£0
2. Farms with farm houses and buildings	7 8 6	4
4. Water corn mills	15 11 6	5

5. On behalf of the appellant it is contended that in ordinary cases the net annual or rateable value of premises is the rent at which the same might reasonably be expected to let from year to year, free to the landlord of all usual tenants' rates and taxes, and tithe commutation rentcharge (if any), and deducting therefrom the probable average annual cost to the landlord of the repairs, insurance, and such other expenses (if any) borne and paid by him, as may be necessary to maintain the premises in a state to command such rent; but where an amount of rent is obtained, which is a fair and bonâ fide one, but which is subject, not only to the payment by the tenant of all such usual tenants' rates and taxes, and tithe commutation rentcharge, but also to the payment

by him of the cost of the labour for repairs and thatching, carting certain portions of the materials, and finding the residue necessary for such repairs, then the net annual or rateable value of the premises is the rent actually paid to the landlord, less the deductions only of the cost of the materials provided, and of the insurance paid by him; and that the proportionate cost of the repairs undertaken by the tenant ought not to be deducted from the rent actually paid, in order to arrive at the net annual or rateable value of the premises. The appellant also contends that no further allowance ought to be made in respect of any contingent or future renewal of the premises.

6. The respondents contend: first, that whether the sums mentioned in the above scale in paragraph 2 are paid by the landlord or by the tenant, they are still sums which, as representing the necessary outlay upon the property, ought to be deducted in order to ascertain the net annual value of such property; secondly, that even if they are wrong in deducting the total amount, the sums paid by the landlord in the scale, paragraph 3, are, at any rate, deductions which should be so made; thirdly, that in the cases of dwelling houses, farms with farm houses and buildings, and the corn mill, there ought to be deducted a sum sufficient to cover a reconstruction or renewal of both buildings and machinery.

The questions for the opinion of the Court were:—

1. Whether under the above terms of tenancy any portion of the cost of repairs which is borne by the tenant ought or ought not to be deducted from the rent actually paid, in order to arrive at the net annual or rateable value of the premises.

2. Whether any allowance should be made in respect of any contingent or future renewal or reconstruction of buildings and machinery, or either and which, and if so, to what amount.

If the rate should be in accordance with the opinion of the Court the order of sessions was to stand; but if not the order was to be quashed, and the rate to be amended in accordance with the opinion of the Court.

May 8. *A. S. Hill*, for the respondents. The occupiers are entitled to the full deductions allowed. First, as to the repairs: the

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gross estimated rental is to be taken, which is here ascertained by the rent paid, and from that are to be deducted, inter alia, the costs of repairs, and it matters not by whom they are paid. Secondly, there is direct authority that the landlord is entitled, in addition to the cost of annual repairs, to put by a sum to meet the deterioration and ultimate renewal of the rateable subject-matter where it is of a perishable nature, such as machinery and buildings: *Reg.* v. *Midland Railway Company.* (1)

J. O. Griffits, for the appellant. If the occupiers are allowed, as a deduction, the whole of the cost of repairs, they will have been allowed twice over that portion of it which they bear themselves. The mistake arises from taking as the gross estimated rental the rent actually paid; that is no criterion of the gross rental when the terms are special. Whatever are the special terms, in ascertaining the rateable value, you are bound by 6 & 7 Wm. 4, c 96, s. 1, to consider what would be the rent if the property were let on the terms of the statute, that is, free to the landlord of all tenants' rates and taxes, and the landlord doing the repairs: and then you are to deduct from that the cost of repairs. If each of the premises now in question were let on the above terms, instead of the special terms, it is clear the rent would be just so much more than it now is by the amount of repairs which the tenant, in fact, undertakes. From that larger sum would have to be deducted the whole cost of the repairs, but the result would be exactly the same as if you took the lower sum, viz. the rent actually paid, and then deducted only the proportion of repairs paid by the landlord. It is clear, therefore, that in allowing the whole of the repairs to be deducted from the rent actually paid, the sessions have allowed too much, and the rating in each case must be increased by the amount of repairs borne by the occupier. Secondly, as to a further sum for possible reconstruction, it is sufficient to say that is the first time that such an allowance has ever been asked. The case of railways is anomalous, and is no authority for the allowance in other cases.

Cur. adv. vult.

(1) 15 Q. B. 313, 364-6; 20 L. J. (M.C.) 124, 145-6.

July 9. The judgment of the Court (Cockburn, C.J., and Shee, J.) was delivered by

COCKBURN, C.J. (1) Two questions present themselves for our decision in this case, both turning on the construction to be put on that part of the 1st section of the Parochial Assessment Act, 6 & 7 Wm. 4, c. 96, which provides that, in estimating the value at which property is to be assessed, a deduction is to be made from the rent, at which the same might be reasonably expected to let by the year, and which is to be taken as the criterion of value, of "the probable annual average cost of the repairs, insurance, and other expenses necessary to maintain it in a state to command such rent."

The first question is whether, where houses or other buildings, either with or without land, are let to a tenant, and the tenant agrees to take upon himself, either wholly or in part, the repairs and other expenses to which the section refers, and which would ordinarily fall upon the landlord, an allowance is to be made in respect of such repairs and expenses, as though they were defrayed by the landlord.

On the hearing we were disposed to think that, as the rate, when assessed, is to be paid by the occupier, the tenant, the repairs and other expenses necessary for keeping the property in proper condition, which he has thus taken upon himself, might, as against him, be taken as so much rent, and would not, in his hands, be capable of being deducted. On further consideration, however, we are of opinion that the standard of value adopted by the legislature is the value of the property to the owner, whether it remains in his own occupation or is let to a tenant. Now, to the owner the measure of this value is the rent at which the property is let, or might be let, subject to the deduction which such owner, as a prudent man, ought to make from the available income which the rent would otherwise afford, in order to meet the expenses necessary for keeping the premises in a state to command the rent.

Where, by an arrangement between the landlord and the tenant, the latter takes upon himself to defray these expenses,

(1) The judgment was read by Blackburn, J., the Chief Justice being engaged at Nisi Prius.

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or any part of them, it is obvious that the rent he can afford to pay will be pro tanto less than if such expenses were borne by the landlord. We cannot think the statute meant to make the rateable value of the premises depend on the terms on which they are actually let, but upon that rent which might reasonably have been expected if they had been let on the statutable terms. In order, therefore, to give effect to the intention of the legislature, it is necessary to consider these expenses as added to the rent, but then as to be deducted by the landlord; thus leaving the rent actually paid by the tenant as the amount on which the rate ought to be assessed. We therefore answer the first question by saying that the cost of repairs borne by the tenant ought not to be deducted from the rent actually paid, and that the rent so paid is the rateable value of the premises.

The second question submitted to us is, whether any allowance should be made in respect of any contingent or future renewal of buildings or machinery. We are of opinion that such allowance ought to be made. Farm buildings and machinery are, by the effects of weather and of wear and tear, reducible to a state which will render them unworthy of repair, and necessitates their reconstruction. They cannot at length be kept up but at an expense which renders it practically impossible, because not reasonably prudent, to keep them up.

Provision made for a future liability to reconstruct them, involving, as it ought to do, a prudential parsimony as respects all but temporary and indispensable repairs, is an expense which may properly be included among the expenses necessary to maintain an hereditament, consisting in part of subjects perishable, in a state fit to command the rent, and which it does, in fact, while standing and in use, command. There seems also no distinction in principle between a sum annually laid by to make good, when it shall become necessary, an inevitable loss by the destructive agency of time, and a fund laid by for an indemnity against a loss by fire, or storm, or other peril insured against.

But although a deduction in respect of the amount which ought, as a matter of reasonable prudence, to be set aside by the owner of property for the reconstruction of buildings or machinery, ought to be made from the rent before the latter is adopted as the test

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of value, yet, under the circumstances of the present case, the reasoning on which our answer to the first question is founded, is equally applicable to the one now under consideration, and we are therefore of opinion that no allowance ought to be made in respect of this head of allowance.

Order of sessions quashed, and rate to be amended.

Attorneys for appellant: *Rickards & Walker.*
Attorneys for respondents: *Park & W. B. Nelson.*

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June 18.

Bankrupt—Protection Order—Process—Arrest under an Order for not supporting Parents—43 *Eliz. c.* 2, *s.* 7—12 *&* 13 *Vict. c.* 106, *ss.* 112 *and* 113.

A bankrupt, who had obtained an order of protection under s. 112 of 12 & 13 Vict. c. 106, was arrested on a warrant of commitment, for not obeying an order made on him under 43 Eliz. c. 2, s. 7, for payment of a weekly sum to the guardians of a union for the support of his mother:—

Held, that the process under which the plaintiff was arrested was of a criminal nature, and not for a debt; and that he was, therefore, not protected from arrest under s. 113 of 12 & 13 Vict. c. 106.

DECLARATION, that after the passing of the Bankrupt Law Consolidation Act, 1849, the plaintiff was duly adjudged a bankrupt, and had duly surrendered and was protected and free from arrest and imprisonment by virtue of an order of the Court; and that whilst he was so protected by the order, he was arrested for debt within the meaning of s. 113 of the act, and the defendant being an officer within the meaning of the said section detained the plaintiff after the plaintiff had shewn to the defendant such protection for a longer time than was necessary for obtaining a copy of the same; that is to say, for three days, whereby the defendant forfeited the sum of 5*l.* for every day the defendant so detained the plaintiff; and alleged as special damage that the plaintiff had been treated as a common felon.

Pleas—1, not guilty; 2, that the defendant was the governor and keeper of the house of correction at Salford, in the county of Lancaster, and that he received the plaintiff into his custody,

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and imprisoned him in the house of correction, in obedience to a warrant duly made and issued by a justice of the peace and stipendiary magistrate duly appointed.

The warrant, which was set out in the plea,—after reciting that the plaintiff, being the son of Ann Mann and a person of sufficient ability to maintain the said Ann Mann, who was poor and impotent and not able to work, and belonged to and was actually chargeable to the union of Charlton, was ordered to pay unto the guardians of the poor of the Charlton union, weekly, from the date of the order, the sum of 3*s.*, for the relief and maintenance of his mother, so long as she should be poor and impotent and chargeable; that he had not observed or performed the same for the space of nine months, whereby he had subjected himself to the penalty of 20*s.* for each month, amounting to the sum of 9*l.*; that the plaintiff had been duly summoned to appear before the magistrate to answer the complaint, but had not shewn any sufficient cause why the order had not been complied with, and why the penalty of 20*s.* a month should not be levied by warrant of distress, or in default why he should not be committed to the common gaol for the space of one calendar month, unless the penalty be sooner paid: that the magistrate issued his warrant to the guardians and to the constables of the said county, commanding them to levy the sum of 9*l.*, and the sum of 16*s.* 6*d.* for the costs incurred in obtaining the warrant, by distress and sale of goods and chattels of the plaintiff, and it appeared by the return to the warrant of distress that no sufficient distress whereon to levy the said sums could be found,—commanded the guardians to take the plaintiff, and deliver him to the keeper of the house of correction, and the keeper to receive the plaintiff into his custody in the house of correction, and there to imprison him for the space of one calendar month, unless the sum of 9*l.*, together with the sum of 16*s.* 6*d.* for the costs attending the distress, and the further sum of 6*s.* 6*d.*, being the costs and charges of the commitment, making in the whole the sum of 10*l.* 3*s.*, should be sooner paid.

The plaintiff joined issue on the pleas.

At the trial before Mellor, J., at the Manchester spring assizes, the following facts appeared in evidence. On the 22nd of August, 1863, an order was obtained by the guardians of Charlton union,

under 43 Eliz. c. 2, s. 7 (1), ordering the plaintiff to pay them the sum of 3*s.* per week for the support of his mother. The plaintiff having fallen into arrear in the payments for the space of nine months, on the 18th of January, 1866, a distress warrant was issued at the instance of the guardians to levy by sale of the plaintiff's goods the sum of 9*l.* and costs, being a penalty of 20*s.* for each month he was in arrear. On the 27th of January, the plaintiff petitioned the county court of Manchester for an adjudication of bankruptcy, and obtained a protection order under s. 102 of the 12 & 13 Vict. c. 106. (2) On the 31st of January, there being no sufficient distress on which to levy, the warrant set out in the plea was obtained, and on the 1st of February the plaintiff was arrested under the warrant and taken to Salford gaol, of which the defendant was the governor, to whom he shewed

(1) 43 Eliz. c. 2, s. 7: "The father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person in that manner and according to that rate as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions, shall be assessed, upon pain that every one of them shall forfeit twenty shillings for every month in which they shall fail therein." The sum assessed by the justices or the penalty is to be enforced by distress and sale of goods, and in default of distress by imprisonment for not more than three months, unless the penalty, &c., and charges be sooner paid under ss. 78 and 99 of 4 & 5 Wm. 4, c. 76.

(2) 12 & 13 Vict. c. 106, s. 112: "If the bankrupt be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and, after such surrender, during the time by this act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed, as the Court shall from time to time, by indorsement upon the summons of such bankrupt, think fit to appoint. . . ."

s. 113: "If any bankrupt shall be arrested for debt or on any escape warrant in coming to surrender, or shall after his surrender and while protected by the order of the Court be so arrested, he shall, on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shewn such protection to him, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit to such bankrupt for his own use a sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit."

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his protection order, and demanded his discharge under s. 113 of the 12 & 13 Vict. c. 106. (1) He was detained in the gaol three days, during which time he was treated as a misdemeanant. His hair and whiskers were cut, he was clothed in the prison dress, and fed on prison fare.

The plaintiff contended that he was protected from arrest, and was entitled to damages for the treatment he had received in gaol as a criminal.

The learned judge left the question of special damage to the jury, and they gave the plaintiff one farthing; but being of opinion that the plaintiff was not protected from arrest, the judge directed a nonsuit, with leave to the plaintiff to move to enter a verdict for 15*l.* and a farthing.

A rule was accordingly obtained, on the grounds that the plaintiff was protected from arrest and detention under s. 113 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106); and that if the plaintiff was not so protected, the defendant had been guilty of excess in the imprisonment and treatment of the plaintiff.

Holker shewed cause. The question is, whether the plaintiff was arrested for a debt or on a charge of a criminal nature. In order to entitle the plaintiff to protection under s. 113 of 12 & 13 Vict. c. 106, he must shew that he was arrested for a debt under civil process. In *Lees* v. *Newton* (2) it was held that attachment for nonpayment of money under an order of the Court of Chancery is practically an execution for a debt, and the taking under such attachment is a taking for a debt within the meaning of s. 113. And in *Rex* v. *Edwards* (3) the rule was laid down that attachments for nonpayment of money are in the nature of civil process to enforce the payment of a debt. In those cases the prisoner owed a debt, and it was only for enforcing payment of that debt that process issued. In the present case, the plaintiff no doubt owes a sum of money, but it is in the nature of a penalty, and he is arrested for disobedience to a statute. The penalty is imposed for not obeying the statute, just in the same manner as a penalty is imposed on a poacher for disobeying the provisions of a statute. Section 7 of 43 Eliz. c. 2, requires the children of every poor person

(1) Ante, p. 551. (2) Law Rep. 1 C. P. 658. (3) 9 B. & C. 652.

being of sufficient ability to maintain their parents "upon pain that every one of them shall forfeit 20s. for every month which they shall fail therein." And ss. 78 and 99 of the 4 & 5 Wm. 4, c. 76, provide for the mode in which the penalty is to be enforced: viz. by distress and sale of the goods of the person in default, and if there is no available distress, then he is to be imprisoned for a period not exceeding three calendar months. The plaintiff here is ordered to be imprisoned for one calendar month; at the expiration of that time he is released from custody; this shews that he is not imprisoned for the nonpayment of a debt, for were it so, he would remain in prison until he paid the debt. If the prisoner escape out of custody, he would not be entitled to the benefit of the protection order: *Anderson* v. *Hampton*. (1) The debts against which the order is a protection must be debts which would be enforced by creditors; no one is a creditor in respect of the penalty, part of it would go to the parish, but they would not be creditors. It is very difficult to say any one is a creditor who could prove for the penalty. There is no case precisely in point. In *Reg.* v. *Governor of Whitecross Street Prison* (2), the commitment of a person for the nonpayment of rates was held to be a commitment on civil process, because no indictment would lie; but in *Rex* v. *Robinson* (3) it was held that an indictment would lie against a parent for disobedience to an order for not maintaining his children. With regard to the damages of one farthing, they cannot be recovered, as the plaintiff was rightly treated as a criminal.

R. G. Williams, in support of the rule. It is said by the other side that, because an indictment would lie for disobedience to an order made on a son to support his parent, the offence is of a criminal character. This is a fallacy; every disobedience of an order of sessions is indictable. *Rex* v. *Robinson* (3) decides that disobedience to an order of sessions ordering payment of the costs of the removal of a pauper is indictable, but the nonpayment of the costs is not a criminal offence. The offence here is for not paying the sum of 3s. a week; and this is a different case to that of a penalty inflicted on a poacher; there the offence is not

(1) 1 B. & A. 308. (2) 6 B. & S. 371; 34 L. J. (M.C.) 193.
(3) 2 Burr. 799.

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the nonpayment of money, but the committing a particular act, trespass and killing game. It is true no action would lie against the plaintiff to recover the amount ordered to be paid, but there is the statutory remedy by distress and sale of his goods. It is unnecessary to contend that there is in the strict sense a debt for which a creditor can prove: it is sufficient if there be an obligation to pay money which can be discharged by the payment of the sum demanded. The warrant of commitment then would be in the nature of civil process to enforce the original obligation to pay the sum ordered. The offence is not the not supporting the parent, but that the plaintiff does not pay the sum to which he is assessed by the justices. The nonpayment of the sum is merely the nonperformance of a civil obligation, and the penalty which is attached to it cannot convert the civil obligation into a criminal offence. The case is analogous to that of nonpayment of a poor rate. The process in the present case is civil process, and the plaintiff is protected from arrest. [He was not heard on the question of damages.]

BLACKBURN, J. The question which arises under s. 113 of 12 & 13 Vict. c. 106 is, whether or not the plaintiff was protected by the order of the county court from the process under which he was arrested. That depends upon the nature of the process under which he was arrested and the nature of the process from which the bankrupt is protected. Section 113 relates back to s. 112, which provides that, if a bankrupt be not in prison, he shall be free from arrest in coming to surrender, and after such surrender for such further time as shall be allowed him by the commissioner; and if he be in prison he may be brought up to be examined or to surrender, and after he has been adjudged a bankrupt and has surrendered and obtained his protection from arrest, if he be in prison or arrested for debt, the Court may order his immediate release. Now, the words of s. 112 are nearly similar to those contained in the bankruptcy acts passed before 12 & 13 Vict. c. 106, and the point was considered in *Darby* v. *Baugham* (1), and the decision of the Court was, that the object of the enactment then in force was to give protection to the same extent, and in the same way, to a bank-

(1) 5 T. R. 209.

rupt, as a witness who was going to court to give evidence would receive protection, and therefore a bankrupt's creditors could not arrest him as he was going to surrender. The protection which the bankrupt receives being analogous to that accorded to a witness, the process against which he is protected is in the nature of civil process, but if on the other hand the process is in the nature of criminal process he is not protected.

The question remains, what is the nature of the process under which the plaintiff was arrested? What is it that the plaintiff has done or omitted to do? He is the son of a woman who is chargeable to the parish, and he is of sufficient ability to support her. There was a moral duty on him, but at common law no legal duty, to support her. By statute 43 Eliz. c. 2, s. 7, it is enacted, that the children of every poor person not being able to work, being of sufficient ability, shall, at their own charge, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices shall be assessed, upon pain that every one of them shall forfeit 20*s.* for every month which they shall fail therein. It was as a punishment for the disobedience of an order made under this section that the plaintiff was arrested. Mr. Williams' argument is that the plaintiff was arrested for not paying a sum of money which he was ordered to pay to the parish, and therefore it was only for the nonpayment of a debt that he was arrested. But the payment of the sum is only one mode by which the plaintiff complies with the statute. The statute makes what was a duty of imperfect obligation a positive duty. I agree that the fact that an indictment will lie for a disobedience of an order of sessions is no reason that the disobedience should be an offence of a criminal nature. The offence here is that the plaintiff being of ability would not support his impotent relative—that is a duty the neglect of which, though only morally wrong before the statute, is made a crime by the statute. It seems to me, therefore, that the commitment is not in the nature of civil but of criminal process to punish the plaintiff for not performing the duty imposed on him by statute. It is quite true, that on payment of the money he would get off the imprisonment, but still it is in the nature of criminal process, and consequently the plaintiff was not entitled to his discharge. He must, therefore, fail to recover the

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15*l.* penalty or the farthing damages which the jury have given him, because he was properly imprisoned as a misdemeanant, and not as a debtor. There was evidence that it was necessary for his health, and for the sake of cleanliness, that his hair and whiskers should be cut, and it was a question for the jury whether there was any excess in this respect, and I think we must take it there was none.

MELLOR, J. I am of the same opinion. I was impressed by the argument of Mr. Williams that whether the plaintiff could be indicted or not for a disobedience of the order, was not the test whether the offence was criminal or not. But I have come to the conclusion that the duty of a son to support his mother, having been originally moral only, was made a positive duty by the statute, which requires that, in the event of the son neglecting that duty, he shall pay such sum as the justices shall order, and then the ultimate enforcement of that duty is carried out by fixing a penalty, and in the event of the nonpayment of that penalty a punishment of not more than three months imprisonment is imposed. That is in the nature of a punishment for a criminal offence. It is not at all analogous to the case of an indictment for disobeying an order of sessions for the payment of poor-rates, nor to an attachment for nonpayment of money pursuant to the order of the Court of Chancery, where the process is in the nature of an execution for a debt. The circumstances of this case shew that the imprisonment is a punishment for an offence, and not for enforcing a mere obligation to pay money. The plaintiff, therefore, is not entitled to the penalty for which he sues, nor to the damages the jury have given him; the rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *Merriman & Pike.*

Attorney for defendant: *W. Hunt, for Hulton & Lister, Manchester.*

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June 27.

Municipal Corporation—Town Councillor, election of—Mayor "incapable of acting"—Returning Officer, election of Alderman in place of Mayor—Eligibility of Mayor as candidate for Town Councillor—Municipal Corporations Act (5 & 6 *Wm.* 4, *c.* 76), *ss.* 28, 36.

Section 36 of 5 & 6 Wm. 4, c. 76 enacts "that if the mayor of any borough shall, at the time when it shall be necessary to execute the powers and duties herein provided with respect to elections, be dead, absent, or otherwise incapable of acting, the council of such borough shall forthwith elect one of the aldermen to execute all such powers and duties in the place of the mayor."

In a borough not divided into wards, the mayor, being returning officer, offered himself for re-election as town councillor, and the council elected one of the aldermen to act at the election in the place of the mayor; the mayor was re-elected a town councillor:—

Held, that the mayor was not disqualified as a candidate, but he could not act as returning officer; that he was "incapable of acting" within the meaning of the section; and, consequently, that the appointment of the alderman as substitute and the election were valid.

QUO WARRANTO information, calling on the defendant to shew by what authority he claimed to have, use, and enjoy the office of councillor of the borough of Dunheved, otherwise Launceston.

The plea, in substance, stated that the borough of Dunheved, otherwise Launceston, since the passing of the 5 & 6 Wm. 4, c. 76, are a body corporate and politic, by the name of the mayor, aldermen, and burgesses of the borough of Dunheved, otherwise Launceston; and that within the borough, pursuant to the provisions of the act, there of right ought to be one mayor, four aldermen, and twelve councillors of the borough, to be elected in the manner specified in the act; that the borough had not been divided into wards; and that one third part of the twelve councillors was upon the 1st of November, 1836, and on the 1st of November in every succeeding year, to go out of office; that on the 1st of November, 1866, one third part of the whole number of councillors who had then been for the longest time in office without re-election went out of office, and that thereupon it became necessary for the mayor of the borough to execute the powers and duties in and by the act provided with respect to elections, and

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that the mayor was incapable of acting, and thereupon the council of the borough did forthwith lawfully elect one John Doidge, an alderman of the borough, to execute all the powers and duties in the place of the mayor; and that afterwards an election of four councillors to supply the places of those who so went out of office was duly held before John Doidge, so being such alderman so lawfully elected in that behalf by the council of the borough to execute the powers and duties of the mayor with respect to elections, and before Thomas White and John Turner, who then were the two assessors at and for the court for the election of the councillors. The plea then alleged that the defendant was a candidate to be elected one of the councillors to supply the place of one of those councillors who had gone out of office, and that he had been duly elected and accepted the office.

The relator traversed that the mayor was incapable of acting as alleged, and also that the council of the borough did lawfully elect the said John Doidge an alderman of the said borough to execute all the powers and duties in the place of the mayor as alleged, upon which issue was joined.

At the trial at the Cornwall spring assizes, before Byles, J., the following facts were admitted:—The municipal borough of Launceston is included in schedule B. of the 5 & 6 Wm. 4, c. 76, and is not divided into wards; and, consequently, by s. 32, the mayor is returning officer at the election of town councillors. The corporation consists of a mayor, four aldermen, and twelve councillors, four retiring every year. The defendant was mayor, and continued in office as mayor until the 9th of November, 1866. He, being one of the four councillors having to go out of office on the 1st of November, was duly nominated, on the 25th of October, as a candidate for re-election. There were also six other candidates duly nominated, making seven candidates for the four vacancies. On the 29th of October, at a meeting of the council, an alderman was appointed to act for the mayor at the election.

The following is a copy of the minute:—

"The mayor having stated his inability, consequent on being candidate for re-election on the 1st of November, to execute the powers and duties of mayor under the Municipal Act, proposed by Mr. D. Pearse, seconded by Mr. A. Shepherd, and carried unani-

mously,—That Mr. Alderman Doidge be elected to execute all such duties in the place of mayor."

On the day of election (November 1st), the alderman performed the duty of returning officer with the assessors. The defendant was present in the council room during the whole of the day of election, and was in good health.

The defendant had a majority of votes, and was returned as duly elected.

A verdict was entered for the Crown, leave being given to the defendant to move to enter the verdict for him, on the ground that on the true construction of the 5 & 6 Wm. 4, c. 76, s. 36, the defendant was "incapable of acting." (1)

A rule having been obtained accordingly,

H. T. Cole, Q.C., and *Lopes*, shewed cause. There are two questions: First, whether the mayor of a borough not divided into wards is eligible for the office of town councillor. Secondly, whether the appointment of Mr. Doidge to act as returning officer in the stead of the mayor is legal. As to the first point, *Reg.* v.

(1) 5 & 6 Wm. 4, c. 76, s. 28 .... "Nor shall any person be qualified to be elected, or to be a councillor or an alderman of any such borough, who shall not be entitled to be on the burgess list of such borough, nor unless he shall be seised or possessed of real or personal estate, or both, to the following amount, that is to say, in all boroughs directed by this act to be divided into four or more wards to the amount of one thousand pounds, or to be rated to the relief of the poor of such borough upon the annual value of not less than thirty pounds, and in all boroughs directed to be divided into less than four wards, or which shall not be divided into wards, to the amount of five hundred pounds, or to be rated to the relief of the poor in such borough upon the annual value of not less than fifteen pounds, or during such time as he shall hold any office or place of profit, other than that of mayor, in the gift or disposal of the council of such borough."

By s. 32 the election of councillors is to be before the mayor and assessors; but by s. 43, where the borough is divided into wards, the election for each ward is to be before the alderman elected for the purpose.

s. 36: "If the mayor of any borough shall, at the time when it shall be necessary to execute the powers and duties herein provided with respect to elections, be dead, absent, or otherwise incapable of acting, the council of such borough shall forthwith elect one of the aldermen to execute all such powers and duties in the place of the mayor. . . ."

By 22 Vict. c. 35, s. 6: At any election of councillors to be held for any borough or ward, the nomination of any candidate is to be sent to the town clerk at least two whole days (Sundays excluded) before the day of election.

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Owens (1) would seem to shew that, if the borough is divided into wards, the mayor is eligible as a candidate for town councillor for a ward in which he is not acting as returning officer. In the present case the borough is not divided into wards, and the mayor is ex officio returning officer; he is therefore disqualified from being a candidate for the office of town councillor.

Secondly, by s. 36 of 5 & 6 Wm. 4, c. 76, it is enacted that if the mayor of any borough shall at any time, when it shall be necessary to execute the powers and duties herein provided with respect to elections, be dead, absent, or otherwise incapable of acting, the council of such borough shall forthwith elect one of the aldermen to execute all such powers and duties in the place of the mayor. "Otherwise incapable of acting" means incapable of acting through mental incapacity, or incapacity caused by sickness, or incapacity of a physical character, it does not mean incapacity not involuntary but caused by the mayor himself. No doubt Lord Campbell, in *Reg.* v. *Owens* (2), expresses an opinion that s. 36 meets any difficulty that may arise from the mayor being a candidate for election as a councillor; but Crompton, J. (3), doubts whether the words incapable of acting were intended to apply to such a case as this. The mayor cannot act as returning officer and return himself; he cannot therefore delegate to a deputy a power which he does not possess. The appointment of Mr. Doidge was therefore illegal.

Pinder, in support of the rule. With regard to the first point it is quite clear from s. 28 that the mayor quà mayor is not disqualified from being a candidate for the office of councillor. If the borough was divided into wards he could clearly have been a candidate, and the fact that the borough is not divided into wards can make no difference. In *Reg.* v. *Blizard* (4), Cockburn, C.J., says: "The mayor cannot exercise the functions of returning officer, and also at the same time offer himself as a candidate." This is the correct view of the law; and in *Reg.* v. *Owens* (2), Lord Campbell says s. 28 of the 5 & 6 Wm. 4, c. 76, "merely enacts that

(1) 2 E. & E. 86; 28 L. J. (Q.B.) 316, 5 Jur. N.S. 764.

(2) 2 E. & E. at p. 91; 28 L. J. (Q.B.) at p. 318, 5 Jur. N.S. 765.

(3) 2 E. & E. at p. 93; 28 L. J. (Q.B.) at p. 319, 5 Jur. N.S. 766.

(4) Law Rep. 2 Q. B. 55, 58.

the mayor is eligible, but not that he is to be returned by himself. . . . . The mayor is not eligible, if he is proposed as a candidate whilst the election is going on, for then he is acting, and must act, as returning officer, and, being so, he cannot be a candidate any more than a sheriff can be proposed to represent his own county in parliament." But now, by 22 Vict. c. 35, s. 6, the candidates must be nominated two whole days before the election. Lord Campbell's observations in *Reg.* v. *Owens* (1) have reference to the law as it stood under the 5 & 6 Wm. 4, c. 76; if before the nomination of candidates a substitute to act for the mayor is appointed by the council under s. 36, the mayor is eligible.

Secondly, the appointment of Mr. Doidge to act as returning officer is valid. The dictum of Lord Campbell in *Reg.* v. *Owens* (1) is in point; he says: "Section 36 enables the council to provide a substitute, if the mayor is otherwise 'incapable of acting,' and meets this case because the mayor, being a candidate, is incapable of acting."

[BLACKBURN, J. The language of s. 16 of the 7 Wm. & 1 Vict. c. 78, is different; the words are, "in case of illness or incapacity to act."]

It never could have been the intention of the legislature that the mayor could be re-elected councillor in a borough divided into wards, but could not be re-elected in a borough not divided into wards. If a restricted meaning is put on the words, "otherwise incapable of acting," in s. 36, it would have this effect.

BLACKBURN, J. I think in this case that the defendant was not, because he held the office of mayor, disqualified from being a candidate for the office of councillor; that there was no valid objection to the election; that therefore he was properly returned as elected; and consequently that this rule to enter the verdict for the defendant must be made absolute. The objection to the defendant's election is, that he was the mayor of the borough, and that in a borough like Launceston, which is not divided into wards, the mayor is ex officio the returning officer; that he, therefore, cannot be a candidate, as no man can preside at his own election and

(1) 2 E. & E. at p. 91; 28 L. J. (Q.B.) at p. 318; 5 Jur. N.S. 765.

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return himself. This last proposition was all that was decided in *Reg.* v. *Owens.* (1)

Now, it is to be observed that the mayor is not disqualified from being a candidate, except so far, that if a candidate he is disqualified from acting as returning officer, and so returning himself. The proposition may be stated in two ways, either that the mayor is incapable of being a candidate at an election where he is returning officer, or that he is incapable of acting as returning officer where he is a candidate. I think the last is the proper way of stating it. The mayor is not disqualified from being elected councillor, but he is disqualified from performing that part of the duty of returning officer which consists in returning himself, he being interested in the election.

The next question is, what is the construction of the words of s. 36, "incapable of acting"? I think those words would include the case where the mayor, being ex officio returning officer, was a candidate, and so incapable of performing the functions of returning officer at that election. As soon as he had been nominated a candidate, which must now be two clear days before he is to act as returning officer (2), he becomes "incapable of acting" at that particular election, and consequently if the words of the section had been simply that the council were to appoint a person when the mayor was incapable of acting, this case would have been clearly within the words of the act. The objection that the deputy cannot act where his principal is disqualified would be good, if the section required that the mayor should appoint a deputy, but the mayor is not to appoint a deputy, nor does the section require that the town council shall appoint a deputy. What is required is, that in cases where the mayor is incapable of acting the council shall appoint another person to act in his place, not as his agent, nor as his deputy, but as his substitute. I think, therefore, where the mayor is personally disqualified, the right course is for the council to appoint a substitute as they have done here. In like manner, under the Lands Clauses Act, where the sheriff is interested and cannot act, neither can his undersheriff, but the coroner is substituted in his place. The sheriff, where he is a party, cannot

(1) 2 E. & E. 86; 28 L. J. (Q.B.) 316. (2) 22 Vict. c. 35, s. 6.

summon the jury, neither can his undersheriff, but the coroner can and does summon the jury: and the reason is, that the substitute is not affected by the personal disqualification which attaches to the person for whom he is substituted.

There is another objection raised to this construction of the section, and there is a plausible ground for saying that the present is casus omissus. The general rule of construction is, that where there are a number of things specified, and general words follow, the general words are meant to be confined to things ejusdem generis with those specified. The words of s. 36 are, "be dead or absent, or otherwise incapable of acting;" if the legislature had meant to include every case in which the mayor was incapable of acting, they ought, it is contended, expressly to have so enacted; and when the words used are "dead, absent, or incapable of acting," the legislature meant some incapacity of acting analogous to death or absence, which, no doubt, are physical objections, and not mere legal objections arising from his situation rendering him incapable of acting. The argument is plausible, and I presume it was this argument which made Crompton, J. (1), doubt whether he could agree with Lord Campbell in his construction of s. 36. We have now to decide the question, and though the argument is plausible, I do not think it is sufficiently cogent to make us cut down the meaning of the words, so as to exclude this case and make it casus omissus. I think the section applies not merely to incapacities, such as the death or absence of the mayor, but to all incapacities, including that of acting as returning officer by reason of being a candidate. I am therefore of opinion that the appointment by the council of a substitute to act in the place of the mayor was valid, and that consequently this rule must be made absolute.

MELLOR, J. I am of the same opinion. Although I was not free from doubt as the argument proceeded, upon the whole I come to the conclusion that the construction which my Brother Blackburn has put upon this section is the right one.

When we consider s. 36, it professes to provide for the death,

(1) *Reg.* v. *Owens*, 2 E. & E. at p. 93; 28 L. J. (Q.B.) at p. 319.

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absence, or other incapacity of the mayor, with respect only to his acting at elections; it is confined to the duties which devolve upon the mayor with respect to elections; it provides "that, if the mayor of any borough shall, at the time when it shall be necessary to execute those powers"—plainly referring to circumstances which may render it necessary for the powers and duties of the mayor with respect to elections to be exercised by another. When those circumstances arise, then the council are forthwith to appoint a substitute in place of the mayor. I have not been free from doubt as to whether or not the other incapacity must not necessarily be an incapacity of a physical character, because the words which precede it—"dead, absent"—are of that character. I have no doubt that, under ordinary circumstances, and without anything else to guide us, that would be a right canon of construction; but when we consider what are the duties which are intended to be provided for, I rather think we are not departing from the general rule of construction when we say there are circumstances here which prevent a strict application of that rule. It is clear that the mayor, under s. 28, is not incapacitated from being a candidate. If he is not incapacitated from being a candidate, it may well be that it was in the contemplation of the legislature that the mayor, although qualified to be a candidate, could not act as returning officer.

It appears to me also that, upon the authority of *Reg.* v. *Owens* (1), the words of s. 36 are not to be confined to incapacity of a physical character, but may be construed so as to include legal incapacity. I find Lord Campbell very clearly expresses that to be his opinion in *Reg.* v. *Owens* (2), because, in alluding to s. 28, he says: "It enacts merely that a mayor is not to be ineligible as a councillor by reason of his office; not that the mayor, when acting as returning officer, may return himself as a councillor." He makes the distinction; but he says: "Section 36 gives the means of substituting an alderman to preside as returning officer at elections whenever the mayor, from whatever reason, is incapable of acting." Therefore, so far as the authority of Lord

(1) 2 E. & E. 86; 28 L. J. (Q.B.) 316. 5 Jur. N.S. 764

(2) 2 E. & E. at p. 91; 28 L. J. (Q.B.) at p. 318. 5 Jur. N.S. 765

Campbell goes, it is clear he considered that s. 36 was not confined to physical incapacity; and Wightman and Erle, JJ., agree with him. Wightman, J., says: "Section 28, which has been relied upon for the defendant, provides only that the mayor shall not be ineligible by reason simply of his being mayor; it gives no power to the mayor, while acting as returning officer, to return himself; and if, while so acting, he is proposed as a candidate, he is clearly ineligible." And then Erle, J., in nearly the same words, says the same thing. Now, neither of them seem to have been struck with the doubt that occurred to Crompton, J., although Lord Campbell had declared that incapacity might arise from any cause. Crompton, J., says: "I rather doubt whether s. 36, empowering the appointment of a substitute when the mayor is incapable of acting, was intended to apply to such a case as this." I confess that was the doubt I entertained; but I cannot help thinking that, whatever might have been the doubt in the mind of Crompton, J., we must consider that the other three judges were of opinion that incapacity need not be physical incapacity.

The functions of the mayor, as returning officer, do not commence until after the nomination has taken place, because all the duties, preliminary to the day of declaring the poll, are to be performed by the town clerk. No person can be a candidate at the election unless nominated two days before the election, and if there be no more persons nominated than there are vacancies, then, no doubt, the persons nominated become elected, and then only does the duty of returning officer commence (1); whether he be the alderman appointed under s. 36 when the mayor is incapacitated, or the mayor when the mayor is not incapacitated—the duties of the returning officer do not commence until it is necessary to publish the lists. That appears to me to remove any doubt on the point: for I may fairly conclude that the full effect of the section is, that if the mayor himself is a candidate, ipso facto it becomes necessary forthwith to elect some other person to perform those functions which he would perform if he was not incapacitated from performing them by the fact of becoming a candidate; and therefore, if the council do appoint an alderman in his place, the

(1) 22 Vict. c. 35, s. 6.

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mayor is certainly qualified to be elected, and may be elected a councillor. I think, therefore, that the rule should be made absolute.

Rule absolute.

Attorneys for relator: *Coode, Kingdon, & Cotton, for R. K. Frost, Launceston.*

Attorneys for defendant: *Pattison & Wigg.*

June 29.

HUDSON *v.* EDE.

Ship and Shipping—Charterparty, Construction of, with reference to Port of Loading—"Detention by Ice and Quarantine not to be reckoned as Laying Days."

A charterparty provided, that the ship should proceed to Sulinah, or outside, in sufficient depth of water to load the ship, and there load from the agents of the merchants a complete cargo of grain. The cargo to be brought and taken from alongside the ship at the ports of loading and discharge at charterer's expense and risk. Thirty running days to be allowed (if the ship be not sooner despatched) for loading and unloading, and ten days on demurrage, over and above the laying days, at 6*l.* a day; *detention by ice and quarantine not to be reckoned as laying days.*

There are no storehouses at the port of Sulinah itself; but the grain shipped at Sulinah is kept at places higher up the Danube, and is brought by steam lighters down the river and unloaded into ships waiting their lading at Sulinah. The ship being ready to load notice was given to the charterer; but after six days, before any cargo had been supplied, the river immediately above Sulinah became frozen up, and so remained for two months, the port of Sulinah itself remaining open. The ship having been thus delayed waiting for cargo:—

Held, that, as from the circumstances of the port the cargo had to be brought down the river after the arrival of the ship, "detention by ice" must be construed to extend to detention by ice of the lighters coming down the river to load the ship; and that the shipowner could not recover demurrage or damages for the time during which the river above Sulinah was frozen.

Held, also, that the ignorance of the shipowner as to the circumstances of the port did not affect the question; nor did the fact that the charterer by greater diligence might have loaded the ship before the navigation was interrupted, as he was entitled to the whole of the laying days, which would have been sufficient had not the navigation been interrupted.

THIS was an action to recover the sum of 714*l.* 1*s.* 3*d.*, alleged in the first count of the declaration to be due on a charterparty of the ship *Fria*, whereby it was agreed that the ship, then on her

voyage to Sulinah, should proceed thither; and that the defendant should there load her with a full and complete cargo of grain or seed at defendant's option, and that the ship should then proceed to a safe port in the United Kingdom, or on the Continent, between Havre and Hamburg, calling at Queenstown or Falmouth for orders, and should deliver the cargo to defendant on payment of freight at the rate of 8*s.* 3*d.* per quarter, with ten guineas gratuity in cash on unloading and right delivery, deducting three months' interest at 5*l.* per cent., and that thirty running days should be allowed the defendant for loading and unloading, and ten days on demurrage at 6*l.* per day. The declaration then averred that the ship sailed to Sulinah, and was there loaded with a full cargo of Indian corn, and carried it by order to Belfast, and there delivered it to defendant. The first count alleged, by way of breaches,—1st, nonpayment of freight and gratuity; 2ndly, nonpayment of the agreed demurrage for the ten days; and 3rdly, detention of the ship for seventy-four days beyond the lay and demurrage days.

There was a second count for money payable for freight, and gratuity for the conveyance by the plaintiff for the defendant, at his request, of goods in ships, and for demurrage of a ship kept on demurrage by the defendant, for money paid, and on account stated.

The defendant pleaded to the first count, as to detention for sixty-three out of the seventy-four days, a denial of the agreement.

Secondly, to the same portion of the first count, a denial of the alleged detention.

Thirdly, to the same, that by the charterparty it was provided that the act of God, the Queen's enemies, restraint of princes, fire, and all and every other dangers and accidents of the seas, rivers, and navigations of whatever nature during the voyage, were to be mutually excepted, and that detention by ice and quarantine should not be reckoned as laying days, and averred that the alleged detention during the sixty-three days was caused by the dangers and accidents of rivers and navigation, and by detention by ice within the true intent and meaning of the charterparty.

Fourthly, to the residue of the declaration, payment into court of 351*l.* 19*s.* 3*d.*

The plaintiff replied, taking issue on the first three pleas, and to

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the fourth plea that the sum paid into court was insufficient, upon which the defendant joined issue.

The cause came on for trial before Martin, B., at the Surrey summer assizes, 1864, when a verdict was found by consent for the plaintiff for the amount claimed, subject to the opinion of the Court upon a case, of which the following appear to be the material facts :—

The plaintiff is a shipowner carrying on business at Sunderland, and is the managing owner of the barque *Fria*, of Sunderland, and the defendant is a merchant carrying on business in Great Winchester Street in the City of London.

On the 17th of September, 1862, Messrs. Cousens & Co., shipbrokers in London, as agents of the plaintiff, effected a charter of the ship, then on her outward voyage, to the defendant.

At the date of the charterparty the defendant was absent at Constantinople. The charterparty was signed by Mr. R. W. Cousens, on behalf of the plaintiff, and by Mr. Crosse (the defendant's clerk) on behalf of the defendant, and was as follows :—

"London, 17th of September, 1862.

"It is this day mutually agreed between R. M. Hudson, managing owner of the good ship or vessel called the *Fria* A 1, . . . whereof J. W. Smith is master, now on her way to Sulinah, and Francis B. Ede, of London, merchants. That the ship being tight, staunch, and every way fitted for the voyage, shall, with all convenient speed, after having discharged her outward cargo for owner's benefit, sail and proceed to Sulinah, or outside, in sufficient depth of water to load the ship, or so near thereto as she may safely get, and there load from the agents of the merchants a full and complete cargo of grain or seed at shipper's option (sufficient grain or seed to ballast the vessel to be supplied, if required, before final discharge of outward cargo, time so occupied not to count as lay days), which the merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, &c., and being so loaded shall therewith proceed to a safe port in the United Kingdom of Great Britain and Ireland, or on the Continent, between Havre and Hamburg inclusive, or so near thereunto as she may safely get, calling at Queenstown or Falmouth for orders, which are to be given by return of post, in

reply to the captain's letter to the charterers, or laying days to count, and deliver the same, on being paid freight, as follows:—

"For wheat per imperial quarter delivered, 8*s.* 3*d.*, with ten guineas gratuity; other grain or seed in proportion thereto, according to the London Baltic printed rates, with 10 per cent. additional should the ship discharge on the Continent, being in full of all port charges, pilotages, &c. Indian corn to pay the same rate as wheat. . . . . The cargo to be brought to and taken from alongside the ship at the ports of loading and discharge at the charterer's expense and risk, the ship's boats and crew rendering all customary assistance in towing the lighters, &c. (the act of God, the Queen's enemies, restraint of princes, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, during the voyage always mutually excepted). . . . . The freight to be paid in cash on unloading and right delivery of the cargo, deducting three months' interest at the rate of 5 per cent. per annum on half the amount. . . . . Thirty running days are to be allowed the merchants (if the ship be not sooner despatched) for loading and unloading, and ten days on demurrage, over and above the laying days, at 6*l.* per day. *Detention by ice and quarantine not to be reckoned as laying days.* . . . . The captain to sign bills of lading at any rate of freight, but without prejudice to this charterparty, and at not less than the above chartered rates. The ship to be addressed to charterer's agents abroad free of commission, but paying $2\frac{1}{2}$ per cent. to charterer in London."

The *Fria* sailed from Cardiff coal-laden on the 20th of August, and arrived at Constantinople on the 22nd of October; she sailed from Constantinople on the 26th of October, and on the 7th of November arrived off Sulinah; on the 8th the master reported his arrival to the British vice-consul at Sulinah, who handed him a letter from the defendant authorizing him to re-charter the vessel; and on receipt of instructions from the plaintiff, the master went from Sulinah to Galatz to meet the defendant's agents, Foscolo & Neeser, and on the 27th of November, on his arrival at Galatz, he accepted an offer of a ready cargo of Indian corn, to be furnished by E. A. Ionides, of Ibrail, and accordingly a charterparty was then signed by the master acting for the

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defendant, and by Foscolo and Neeser for Ionides; the defendant having undertaken to pay any difference of freight which might arise from any re-charter.

At the time the master left for Galatz (25th of November) no cargo was ready at Sulinah; but if there had been, the captain would have been ready to take it on board at latest on the 26th of November; the outward cargo was not entirely out till the 7th of December, the captain having been obliged to take in three boat-loads of ballast on the 6th of December before he could take it all out; if a cargo had been ready to load when the captain was ready to receive it, he would not have been obliged to take in any ballast, but no cargo was ever provided by the defendant to ballast the vessel.

On the 28th of November the master of the *Fria* gave notice verbally, and also in writing, to Foscolo & Neeser, that the *Fria* would be ready to receive her cargo on the 29th, the following day, and that the lay days would commence on that day. This was the first notice given by the master, or by any one on his behalf, of the ship being ready to receive cargo.

On the 5th of December, the river Danube immediately above the port of Sulinah (this being an unusually early period of the year for frost to set in) became frozen over, and so continued until the 8th of February in the ensuing year, and during such time the navigation of the river above Sulinah was wholly stopped; but between the 29th of November and the 5th of December the navigation of the Danube was unobstructed, and during that period several cargoes of grain were brought down the river to Sulinah for shipment in that port.

The distance from Galatz to Sulinah is between 105 and 110 miles, and the time required for the conveyance of a steam lighter laden with grain from Galatz to Sulinah by the river Danube varies from eighteen to twenty hours in fine weather to two or three days in bad weather. There exists at Sulinah no storehouses or other places for keeping or storing grain, and the grain is never kept at Sulinah to wait the arrival of a vessel, except sometimes by the Greek and Oriental Steam Navigation Company for their own steamers.

The grain shipped at Sulinah is brought down the Danube from

Galatz, Ibrail, and other places in lighters, and such lighters are, on their arrival at Sulinah, unloaded into the ship intended to export the grain to Europe, or its destination. When there is ice in the Danube between Galatz, Ibrail, or other storing places, and Sulinah, the navigation of the Danube by such lighters becomes difficult, and, when the river is frozen up, impossible. This fact was well known to persons in the grain trade at London, Constantinople, and Sulinah before and at the time of the effecting the charterparty of the 17th of September, 1862, but was not known to the plaintiff or his broker.

On the 16th of December the port of Sulinah became frozen over, and so continued until the 20th of that month, when it was again free from ice. During the period between the 16th and 20th of December all communication with the shore was cut off, but with the exception of that period the port of Sulinah was open and unobstructed, and communication between the different vessels lying in the port, and between all parts of the port and the shore, was unimpeded. During the period between the 29th of November and the 16th of December, several vessels lying in the port of Sulinah were being loaded with grain, and between the 24th and 27th of December several of the vessels so loaded started from Sulinah either wholly or partly laden.

On the 31st of December the plaintiff wrote to the defendant: "Captain Smith, of the *Fria*, advises me, under date of the 8th instant, that the Upper Danube is fast, and that the river is closed below Galatz. I therefore think it right to give you notice that I hold you liable for all delay and consequent demurrage from the ship not being loaded and the cargo provided, in accordance with the terms of the charter."

On the 8th of February the ice in the Danube was broken up, and on the 10th of that month the interpreter of Inglessi, the agent at Sulinah of Ionides, came on board the *Fria*, and informed Captain Smith that the cargo for the *Fria* had arrived at Sulinah. Captain Smith requested that it should be sent alongside to be taken on board, but the interpreter replied that he could not do that until the captain gave him a declaration that he would not reckon as lay days the period between the 5th of December, 1862, and 8th of February, 1863, during which the Danube had been

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frozen over. This the captain declined to do, saying that his lay days would go on during the winter, and he desired that the cargo should be given him, leaving any dispute to be settled in England. The interpreter stated that he could not consent, as the merchants' orders were to require the declaration. On the following night a lighter laden with grain came alongside the *Fria*, but the persons in charge of it refused to deliver it to Captain Smith, and the following day Captain Smith received through the British vice-consul a letter from Mr. Inglessi, as follows: "I beg to inform you, that according to your charterparty, dated Galatz, 15/27 November, 1862, your lay days do not reckon during the whole time of the river being frozen, and that your cargo being in this port since the 9th instant, your lay days ceased as well to reckon from the aforesaid day, being at your disposal to receive it on board. I beg also of you to give me a document as to the number of lay days consumed in this port by your vessel. Protesting all the consequences of your refusal against you as master of the aforesaid vessel, and against your owners." In reply to that letter, Captain Smith stated that he was bound by the terms of his charterparty, and would abide by them; and that he had never refused to take the cargo alongside the *Fria* on board; and he telegraphed both to the plaintiff and the defendant that the cargo was alongside, but the merchant would not ship it without a guarantee not to claim detention by ice, and requested a reply by telegraph.

On receipt of telegram, plaintiff informed defendant that he would look entirely to him for demurrage, and telegraphed to Captain Smith to "forego nothing." "If merchants refuse shipping cargo, re-charter, after protesting; leave as quickly as practicable."

The defendant telegraphed to Messrs. Foscolo & Neeser to insist on Ionides shipping the cargo.

On the 18th of February, 1863, Captain Smith received through the vice-consulate a protest made by Inglessi, and on the 19th of February he made a counter protest.

On the 27th of February, the captain, who had repeatedly, though in vain, demanded his cargo from Ionides, having an offer of a cargo at a freight of 6*s.* 6*d.* per quarter, then at Sulinah, telegraphed to Foscolo & Neeser to ascertain if they could offer any-

thing better, and having received in reply an offer of 6*s.* 9*d.* per quarter, he immediately telegraphed his acceptance.

On the 28th of February, Captain Smith received a letter from Foscolo & Neeser, enclosing a new charterparty duly signed by Negroponte of Galatz.

Under this last charterparty a cargo of Indian corn was put on board the *Fria*, being the same cargo of which a portion had been sent alongside, as before mentioned, under the charter of Ionides.

The loading of the *Fria* was completed on the 6th of March, and on the 7th the captain sent the defendant a copy of the new charterparty.

On the 9th of March, 1863, the *Fria* sailed from Sulinah on her homeward voyage, and arrived at Falmouth on the 10th of May. She was detained there until May 14, when she was ordered to Belfast. She arrived at Belfast on the 26th of May, and discharged her cargo there. The discharge was completed on the 9th of June.

The accounts on being made out shewed a balance due from the defendant to the plaintiff of 714*l.* 1*s.* 3*d.* for which this action was brought.

The Court were to be at liberty to draw any inference from the facts which might have been drawn by a jury.

The question for the opinion of the Court was, whether, under the circumstances of the case, the plaintiff was entitled to recover from the defendant demurrage or damages for the time during which the river above Sulinah was frozen.

If the Court were of opinion in the affirmative, the verdict was to be entered for 360*l.* beyond the sum paid into court; if in the negative, the verdict was to be entered for the defendant.

May 7. *Mellish, Q.C.*, for the plaintiff. It is admitted the days during which the cargo could not be put on board owing to ice in the port of Sulinah, are not to be reckoned as lay days; and the question is, whether the days, during which the cargo was prevented from coming down the Danube from Galatz, Ibrail, and other places in consequence of the river being frozen, fall within the exception. The rule of construction is, that unless the contrary expressly appears, all the provisions of the charterparty are to be

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construed with reference to what the charterer has contracted to do at the port of loading. The defendant has contracted to load the vessel at Sulinah, all the stipulations of the charterparty are to be performed at that port, and, therefore, the words "detention by ice or quarantine not to be reckoned as lay days," must be confined to detention by ice at the port of Sulinah. Those words must be construed with reference to the other words in the same clause; and a detention by quarantine would mean a detention at the port of Sulinah. If this clause is to be construed so as to include detention by ice in the Danube, as grain comes from many places on the river, it would be uncertain how far up the Danube the exception would apply. But for the clause the charterer would not be entitled to any protection: *Barrett* v. *Dutton.* (1) The Danube is not mentioned in the clause, and it only protects the defendant against being liable for detention while the loading of the ship is rendered impossible by ice at the port of Sulinah. In *Kearon* v. *Pearson* (2) the defendant engaged to load on board the plaintiff's ship a cargo of coals "with usual despatch." The coals had to be brought in boats along a canal to a dock where the ship was; a frost rendered the canal unnavigable, and the loading of the ship was impeded; the defendant, however, was held liable for the detention of the vessel. So here, the defendant contracts to load the plaintiff's vessel at Sulinah within a certain number of days, to that contract there is an exception, detention by ice or quarantine; that means, detention at the place where the contract is to be performed.

Sir George Honyman, Q.C. (*Gibson* with him), for the defendant. The charterparty must be construed with reference to the circumstances of the grain trade, as carried on at the port of loading. The contract is, to load a cargo of grain at a port where there are no storehouses, and where the cargo has to be brought down in lighters from places up the Danube, and at once taken alongside the vessel waiting to be loaded. If the charterparty had contained no words of exception, the defendant would have been obliged to load the vessel absolutely within the stipulated time, but he has, by the insertion of a clause, expressly excepted from being reckoned as lay days those days during which the vessel is

(1) 4 Camp. 333. (2) 7 H. & N. 386; 31 L. J. (Ex.) 1.

prevented loading by ice. The clause ought, therefore, to receive a construction sufficiently extensive, regard being had to the mode in which the grain trade is carried on at the port of loading, to meet the intention of the parties. *Kearon* v. *Pearson* (1) has no bearing on the point; there the coals might have been brought from any colliery the defendant pleased, here the grain could only come down the Danube from the places where it had been stored.

Mellish, Q.C., in reply.

Cur. adv. vult.

June 29. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Shee, JJ.) was delivered by

BLACKBURN, J. In this case the defendant chartered the plaintiff's vessel, the *Fria*, by a charterparty, of which the material parts are—that the vessel should proceed "to Sulinah, or outside, in sufficient depth of water to load the ship, or so near thereto as she may safely get, and there load from the agents of the merchant a complete cargo of grain or seed at shipper's option. Sufficient grain or seed to ballast the vessel to be supplied, if required, before final discharge of outward cargo; time so occupied not to count as lay days. The cargo to be brought to and taken from alongside the ship at the ports of loading and discharge at the charterer's expense and risk. Thirty running days to be allowed the said merchants (if the ship be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay days, at 6*l.* a day. *Detention by ice and quarantine not to be reckoned as lay days.*"

It is on the contruction to be put on these latter words that the question depends, the other stipulations in the charterparty being material only so far as they explain the meaning of this provision.

The ship was delayed, during the time as to which the dispute has arisen, not by ice in the port of Sulinah rendering impossible the access to her of lighters from which the cargo might, in the usual course of the Danube grain trade, have been transferred to her hold, but by the obstruction of the navigation between Sulinah and ports higher up the Danube by reason of the river becoming frozen over.

(1) 7 H. & N. 386; 31 L. J. (Ex.) 1.

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It appears that at the port of Sulinah itself there are no storehouses available to the merchants in which cargoes of grain may be kept for loading vessels. The grain is kept at ports higher up the river, and, according to the course of the grain trade of that river, cargoes are brought by steam lighters down the river, and over the bar at its mouth, to ships awaiting their loading at Sulinah.

Galatz, one of these ports, is stated in the case to be situate above 105 miles from Sulinah, the passage of the steam lighters between the two ports being a run of eighteen to twenty hours in fine weather, and of two to three days in bad weather. Ibrail, in the storehouses of which the captain of the *Fria*, acting as agent for the defendant, fixed, on the 27th of November, a cargo for that vessel, is higher up the river than Galatz.

The *Fria* was at Sulinah, ready to receive her cargo, on the 29th of November, and the laying days commenced from that date. The cargo which it was intended to put on board, and which, in fact, was afterwards put on board, was at that time at Galatz. On the 5th of December, an unusually early date for the obstruction of the navigation by ice, the Danube became frozen over above Sulinah, and so continued until the 8th of February of the ensuing year. It was well known to persons in the grain trade at London, Constantinople, and Sulinah, before and at the time of effecting the charterparty, but not known to the plaintiff or his broker, that when there is ice in the Danube, between Galatz or the other storing places and Sulinah, the navigation becomes difficult for steam lighters, and when the river is frozen, impossible.

Between the 29th of November, when the *Fria* was ready to receive her cargo, and the 16th of December—that is, for more than half the time allowed for loading and unloading—several vessels lying in the port of Sulinah were loaded with grain, their cargoes having been brought down the river between the 29th of November and the 5th of December. It may be inferred that, in the usual course of shipment at Sulinah, the lighters await there for some time the convenience of the ships to be loaded from them.

It was expressly agreed that sufficient grain or seed to ballast the ship, should, if required, be supplied before the final discharge

of her outward cargo. No cargo had been provided by the defendant even for this purpose, and the entire discharge of the outward cargo was thereby delayed until the 6th of December, when other ballast was taken in by the captain.

From the 16th to the 20th of December the port of Sulinah was frozen, and all communication between the ships in it and the shore was cut off. Between the 24th and the 27th, the other vessels which have been referred to as having been loaded between the 29th of November and 5th of December, were enabled to start on their respective voyages.

It was not disputed that the days during which the port of Sulinah was frozen over, so that all communication with the shore was cut off, were not to be reckoned as laying days; but the question is, whether the days during which the river above Sulinah was frozen, though Sulinah itself was free, are to be reckoned as lay days, in which case the plaintiff is entitled to recover; or are to be considered as detention by ice, in which case the defendant has paid enough money into court and is entitled to judgment.

It was contended on behalf of the plaintiff that the words "detention by ice not to be reckoned as lay days," must be construed with reference to the object for which, in the preceding clause, the lay days are stated to be allowed, viz. for loading and unloading, and that no obstruction by ice is within the meaning of those words, except an obstruction by ice in contact with, or near, or about the ship, and interposing such a barrier against the access of lighters alongside of her as practically to prevent, or interrupt, the actual work of loading.

For the defendant it was contended that, regard being had to the circumstances under which shipments take place at the mouth of the Danube, and particularly to the fact that the storehouses which supply grain to ships lying at Sulinah are at a distance of 100 miles from that port, the words "detention by ice" must be taken to include not only the prevention and interruption by ice of the actual work of loading,—that is, of bringing alongside the ship in lighters and transferring from them to the ship's hold cargo brought down to Sulinah in fulfilment of the charter,—but also the delaying of the ship's loading by reason of

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the detention by ice of lighters during any part of the time allowed for loading and unloading, and at any distance from Sulinah.

The solution of the question depends upon the inference of fact to be drawn from the statements as to the nature of the port of Sulinah, which have already been set forth.

The merchant, by a charterparty, engages to bring down the cargo at the port of lading and to receive it at the port of discharge within the laying days, and he is answerable for any detention arising from his failure to do so from whatsoever cause, unless he protects himself by a stipulation; and the stipulation, "detention by ice and quarantine not to be reckoned as laying days," was clearly meant to protect the merchant. But for this stipulation, although ice or quarantine prevented the merchant from bringing cargo alongside the ship according to his contract, the shipowner would be entitled to recover for the detention of his ship during every day beyond the laying days. Moreover, to use the words of Lord Ellenborough, in *Barker* v. *Hodgson* (1): The merchant is "the adventurer who chalks out the voyage, who is to furnish at all events the subject-matter out of which the freight is to accrue." He is, in most cases, as he certainly was in the present instance, the party best acquainted with the trade for which the ship is taken up, and with the difficulties which may impede the performance by him of his contract; words, therefore, in a charterparty, relaxing in his favour a clause by which an allowance to him of time for a specified object is in the interest of the ship precisely limited, must be read as inserted on his requirement, and construed, at the least, with this degree of strictness against him, that they shall not have put upon them an addition to their obvious meaning. Nevertheless, where that meaning is ambiguous, as it is in the present case, we think it must be gathered from the surrounding circumstances to which the charterparty was intended to apply. Now, the stipulation, that detention by ice shall not be reckoned as laying days, must be taken to mean that those days, on which ice made it impossible to bring a cargo alongside, and to go on with the loading, should be excluded. But inasmuch as, from the nature of the case, the cargo had to

(1) 3 M. & S. 267, 270.

be brought down the river after the arrival of the ship, the loading would be equally interrupted and detention equally ensue by reason of the navigation of the river becoming impeded by ice, as it would be by the lighters being prevented from coming alongside of the vessel by ice in the port. It was very properly admitted that those days on which the port was frozen so that there could be no communication with the shore were to be excluded, inasmuch as detention by ice would occur so soon as the lighters by which the grain was to be conveyed to the ship were prevented from getting access to her. But, as we have seen, the cargo has to be brought to the ship, not from the port of Sulinah, but from the storehouses at the ports up the river, and the lighters are as much prevented getting to the ship by reason of ice in the one case as in the other.

It is true that, though these facts were well known to persons in the grain trade in London, Constantinople, and Sulinah, before and at the time of the effecting this charterparty, they were not known to the plaintiff and his broker. But the ignorance of the plaintiff and his broker cannot affect the question as to what was the way in which, in this port, cargo could be brought alongside the vessel, or how detention in the loading of the vessel could arise. Now, we think, on the statement, the only way in which cargo could be brought was down the Danube, and consequently that the freezing up of the Danube immediately above Sulinah rendered it impracticable to bring any cargo alongside. If there had been a railway, or any other practicable mode by which cargo might have been brought by land to Sulinah, or if the lower part of the Danube had been left free, so that cargo might have been brought from some places on the Danube, though the ice blocked up the river below the place where the cargo was lying, we might have come to a different conclusion, but, as it is, we think the defendant is entitled to judgment.

The fact, that had the defendant used greater diligence he might have loaded the ship before the navigation was interrupted, does not, we think, affect the question. The defendant was entitled to the benefit of the whole of the laying days, and would have had full time to load his cargo, but for the interruption to the navigation by ice. He is entitled to the advantage which the

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stipulation gives him, and the loss arising from the detention must fall on the shipowner who has agreed to these terms.

Judgment for the defendant.

Attorneys for plaintiff: *Clarke, Son, & Rawlins.*
Attorneys for defendant: *Cotterill & Sons.*

June 27.

LORD GILBERT KENNEDY *v.* THE PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL COMPANY (LIMITED).

THE PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL COMPANY (LIMITED) *v.* LORD GILBERT KENNEDY.

Contract, rescission of, on ground of misrepresentation—Failure of consideration—Company—Misrepresentation in Prospectus.

2 H.L. 338
3 Ch. 684
2 Ch.D. 681,
5 Ch. 87
6 App. Cas. 245

In order to entitle a party to rescind a contract, it is sufficient to shew that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But when there has been only an innocent misrepresentation, it is not ground for a rescission, unless it was such as that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration.

A company, already carrying the intercolonial mails under contracts with the government of New Zealand, issued a prospectus that they were "prepared to receive applications for new shares in order to enable the company to perform the contract recently entered into with the government of New Zealand, for a monthly mail service between Sydney, New Zealand, and Panama, in correspondence with the West Indian Mail Company's steamers between Southampton and Panama." K., induced by this statement in the prospectus, applied for and obtained some of the new shares. The contract alluded to in the prospectus had been made by the company with the agent of the New Zealand government, both parties bonâ fide believing that he had authority to make it; but it turned out that he had no such authority, and the government refused to ratify the contract:—

Held, that the prospectus by implication alleged that there was a binding contract, but being an innocent misrepresentation it did not entitle K. to rescind the contract under which he became a shareholder, as it did not affect the substance of the matter, K. having got shares in the very company for which he had applied, and which shares were of considerable value.

THE first action was brought by Lord G. Kennedy to recover certain instalments paid on shares held by him in the company; the declaration being for money had and received, and on accounts stated; plea, never indebted.

The second action was by the company for a call on the same shares; pleas, never indebted; a traverse of the defendant being the holder of the shares; and that the defendant was induced to apply for the shares by the fraud and misrepresentation of the company: the particulars of fraud being the statement (paragraph 1) in the prospectus set out in the judgment.

On the causes coming for trial before Crompton, J., at the Surrey summer assizes, 1865, a nominal verdict was taken in each, subject to a special case.

The case was very voluminous; but the material facts sufficiently appear in the judgment of the Court.

May 31 and June 1. *Mellish, Q.C.* (with him *H. James*), for Lord G. Kennedy, contended, first, that the New Zealand government, on the construction of the colonial statutes, were not bound by the contract entered into by Ward. Secondly, that the statement in the prospectus published by the company, that the new shares were issued in order to enable the company to perform the contract amounted to a condition, and was not a mere representation. He also contended that there was fraud on the part of the directors. He cited *Behn* v. *Burness* (1); *Ship's Case* (2); *Taylor* v. *Caldwell* (3); *Stewart's Case* (4); *Ex parte Oakes & Peek* (5); *New Brunswick and Canada Railway and Land Company* v. *Muggeridge* (6); *Directors &c. of Central Railway Company of Venezuela* v. *Kisch.* (7)

Manisty, Q.C. (*Denman, Q.C.*, and *Murphy*, with him), for the company, contended that Ward had authority to bind the New Zealand government, and the contract he had entered into was binding on them. Secondly, that looking at the position and duty of the directors, the objects of the company, and all the surrounding circumstances, the statement in the prospectus was a mere representation honestly made, and not a condition the non-

(1) 3 B. & S. 751; 32 L. J. (Q.B.) 204.
(2) 2 De G. J. & S. 544.
(3) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(4) Law Rep. 1 Ch. Ap. 574.
(5) Law Rep. 3 Eq. 576.
(6) 1 Dr. & Sm. 363.
(7) Law Rep. 2 H. L. 100.

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performance of which avoided the contract of Lord G. Kennedy to take the new shares. He cited *Wheelton* v. *Hardisty* (1); *Ollive* v. *Booker* (2); *Behn* v. *Burness* (3); *Conybeare* v. *New Brunswick and Canada Railway and Land Company, Limited* (4); *Pust* v. *Dowie* (5); *Hallows* v. *Fernie.* (6)

Cur. adv. vult.

June 27. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Shee, JJ.) was delivered by

BLACKBURN, J. It appears from the statement in this case, that the company by its then name of the Intercolonial Royal Mail Steam Packet Company (Limited), was in the year 1863 conveying the intercolonial mails under contracts with the government of New Zealand. In that year the government of that colony sent over Mr. Ward, then a member of the executive council and postmaster general of the colony, to this country. The ministerial minute, under which he acted, and which was officially transmitted by the governor of the colony to the secretary of state for the colonies, is set out in the case. The part material to the present question is that he was sent "to represent the government of the colony in Australia and Great Britain upon general questions relating to New Zealand, and especially upon the following matters" (inter alia): 1. "The extension of steam postal service from Great Britain to New Zealand via Panama." Mr. Ward succeeded in making arrangements with the imperial government as to the establishment of such a steam postal service via Panama, and then entered into negotiations for the purpose of procuring a contract on behalf of the New Zealand government, under which the mails should be carried from Panama to New Zealand; and ultimately came to an understanding with this company for that purpose. On the 17th of December, 1863, a contract was executed by him, as postmaster general of the colony, and by the company, in which it is recited that he entered into the contract "under and by virtue of the powers and pro-

(1) 8 E. & B. 232; 27 L. J. (Q.B.) 241.

(2) 1 Ex. 416; 17 L. J. (Ex.) 21.

(3) 3 B. & S. 751; 32 L. J. (Q.B.) 204.

(4) 31 L. J. (Ch.) 297; 9 H. L. C. 711.

(5) 5 B. & S. 33; 34 L. J. (Q.B.) 127.

(6) Law Rep. 3 Eq. 520.

visions of the New Zealand Post Office Act, 1858, and acting under instructions to him for that purpose given by the Governor of New Zealand."

The Colonial Act (1) referred to is made part of the case, and we find on reference to it that it enacts, amongst other things, that, "it shall be lawful for the postmaster general, under such instructions as he shall from time to time receive from the governor, to enter into any contract in writing from time to time on behalf of the government of New Zealand, in the name of the postmaster general, for and in respect of the carriage or conveyance of mails by sea and by land, subject in all respects to such terms and conditions as he may think fit, and the postmaster general for the time being may sue or be sued on any such contract, provided always that no postmaster general shall be personally liable in respect of such contract."

There was a change in the ministry in New Zealand, and Mr. Ward's successors in office refused to recognise this contract, which they maintained was beyond Mr. Ward's authority. The company maintained that the contract was binding; and ultimately, though not till after this action was commenced, a compromise was made, and a contract in some respects different from that of the 17th December, 1863, was made and confirmed by the colonial legislature.

In the meantime the directors of the Intercolonial Royal Mail Steam Packet Company (acting under powers contained in their articles of association) convened a meeting, at which they obtained powers to change the name of their company to that of the Panama, New Zealand, and Australian Royal Mail Company (Limited), and to increase their capital by issuing new shares; and, having done so, they issued a prospectus with the view of obtaining subscriptions. This is headed with the new and old names of the company, and begins thus:—

"Increase of capital by the issue of 37,500 ordinary shares of 10*l.* each, representing the nominal sum of 375,000*l.*; 1*l.* per share to be paid on application; 1*l.* per share fourteen days after allotment; 3*l.* per share the 1st of October, 1864; and 2*l.* per share the 1st of April, 1865; making a payment of 7*l.* per share.

(1) 21 & 22 Vict. No. 15, s. 15; 26th June 1858.

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"1. The directors give notice that they are prepared to receive applications for the new shares, the issue of which was authorized by the special general meeting held on the 3rd March instant, in order to enable the company to perform the contract recently entered into with the General Government of New Zealand for a monthly mail service between Sydney, New Zealand, and Panama, in correspondence with the Royal (West India) Mail Company's steamers between Southampton and Aspinwall (Isthmus of Panama). (1)

"2. The Intercolonial Royal Mail Steam Packet Company was formed in 1858, under a contract to perform the mail service between the several provinces of New Zealand, and between that colony and Sydney, for which they are at present in the receipt of upwards of 36,000*l.* per annum. The company are now firmly established on their several lines, and recent advices shew net profits, after making proper allowances for repairs, depreciation, &c., at the rate of 20*l.* per cent. per annum.

"3. For a long period the establishment of a mail line to New Zealand and Australia, via Panama, has been greatly desired, not only by the colonists, but also by the commercial world at large, and this company, having already a nucleus which enables them to supply the desideratum, have undertaken the service on terms which the directors believe to be at once fair to the colonial government and beneficial to the company."

The prospectus then proceeds to state other benefits likely to arise.

Lord Gilbert Kennedy, having seen the prospectus, applied for 1600 shares, and received an allotment of the whole 1600. He endeavoured to sell some of them, but was not able to obtain the price he required. He paid the two first instalments of 1*l.* per share. Before the third instalment became due, the directors received information of the state of affairs in New Zealand, and by a circular, dated 26th August, 1864, informed the shareholders that the contract was disputed. Lord Gilbert Kennedy immediately claimed to be no longer a shareholder, on the ground that the prospectus had misled him.

(1) This was the statement which was relied on by Lord G. Kennedy as the fraud and misrepresentation.

One of the actions is brought by him to recover back the two instalments of 1*l.* per share which he has paid; the other is brought by the company to enforce payment of the instalment of 3*l.* a share; and the event of both actions depends upon the same question, viz. whether under the circumstances Lord Gilbert Kennedy is entitled to rescind the contract under which he became a holder of the shares.

The first point to be determined is, whether the contract of the 17th of December, 1863, really bound the successors of Mr. Ward; for if it did their wrongful refusal to recognise the contract could in no way be a ground for returning the shares. We think, however, that it was not binding on the government. The reasonable construction of the New Zealand Act of 1858 is, that the authority conferred on the postmaster general was confined to making contracts in respect of the conveyance of mails within the limits where the colonial government at that time had the right to convey the mails; and not to make contracts with respect to the conveyance of mails in parts where the mails belonged to the imperial government; and though by subsequent legislation the colonial legislature authorized their government to enter into arrangements with the imperial government for the conveyance of the mails from Great Britain, the power to do so is made subject to conditions which have not been fulfilled. And even if this were not so, we cannot construe either the mission by the governor of Mr. Ward to England "to represent the government of the colony," as to the extension of steam postal service from Great Britain to New Zealand, nor the delegation, which it appears is given to each postmaster, and was given to Mr. Ward, as equivalent to instructions to make this contract.

The next question is, whether there was any fraud or deceit on the part of the directors in inducing Lord Gilbert Kennedy to take the shares. This is a question entirely of fact. We have no doubt that the statements in the prospectus amount to a representation that the company had a valid and binding contract, and that this representation was intended to induce the public to apply for shares, and did, in fact, induce Lord Gilbert Kennedy to apply accordingly; and if it could be shewn that there was any mala fides in the representation, as, for instance, if it was false to the

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knowledge of those who made it, we should have no doubt that the contract to take the shares might be avoided, and the shares returned. But we think that there is nothing stated in the case to lead to any such conclusion. Mr. Ward all through the proceedings maintained, and, it appears, still maintains, that he had authority, and duly pursued it, so as to bind the government. We think, as already stated, that he was mistaken; but we have no doubt that he believed himself to be right; and very likely even after he hears of this decision he may continue to be of the same opinion; but even if there was fraud on his part, it would in no way affect the present question, which depends on the mala fides of those representing the company.

In the admission set out in the case (par. 49) it is stated that Mr. Ward always represented that he had power to bind the government, and that the company always believed he had up to the 10th of December, 1863, when an opinion of counsel was taken, which ought, it is said, to have led them to think he had not. But that opinion was disputed by Mr. Ward, and was, on consideration, retracted by the counsel who had given it, and the company were finally advised by a competent legal adviser that they were safe in acting on Mr. Ward's authority. We cannot see any grounds for doubting that the directors of the company really believed that the contract was binding. We think they were mistaken, and that when they represented that they had made a binding contract they made an incorrect representation, but we think it was an honest mistake, and not a fraudulent misrepresentation.

The only remaining question is one of much greater difficulty. It was contended by Mr. Mellish, on behalf of Lord Gilbert Kennedy, that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented, and not merely to represent that the company bonâ fide believed it; and that the difference in substance between shares in a company with such a contract and shares in a company whose supposed contract was not binding, was a difference in substance in the nature of the thing; and that the shareholder was entitled to return the shares as soon as he discovered this, quite independently of fraud, on the ground that he had applied for one thing and got another. And, if the invalidity

of the contract really made the shares he obtained different things in substance from those which he applied for, this would, we think, be good law. The case would then resemble *Gompertz* v. *Bartlett* (1) and *Gurney* v. *Wormersley* (2), where the person, who had honestly sold what he thought a bill without recourse to him, was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case, and void under the stamp laws in the other; in both cases the ground of the decision being that the thing handed over was not the thing paid for. A similar principle was acted upon in *Ship's Case*. (3) There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to shew that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract: *Street* v. *Blay*. (4)

The principle is well illustrated in the civil law, as stated in the Digest, lib. 18, tit. 1. De Contrahendâ Emptione, leges, 9, 10, 11. There,—after laying down the general rule, that where the parties are not at one as to the subject of the contract there is no agreement, and that this applies where the parties have misapprehended

(1) 2 E. & B. 849; 23 L. J. (Q.B.) 65.
(2) 4 E. & B. 133; 24 L. J. (Q.B.) 46.
(3) 2 De G. J. & S. 544.
(4) 2 B. & Ad. 456.

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each other as to the corpus, as where an absent slave was sold and the buyer thought he was buying Pamphilus and the vendor thought he was selling Stichus, and pronouncing the judgment that in such a case there was no bargain because there was "error in corpore," the framers of the digest moot the point thus: "Inde quæritur, si in ipso corpore non erretur, sed in substantiâ error sit, ut, puta, si acetum pro vino veneat, æs pro auro, vel plumbum pro argento vel quid aliud argento simile: an emptio et venditio sit;" and the answers given by the great jurists quoted are to the effect, that if there be misapprehension as to the substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. Paulus says: "Si æs pro auro veneat, non valet, aliter atque si aurum quidem fuerit, deterius autem quam emptor existimarit: tunc enim emptio valet." Ulpianus, in the eleventh law, puts an example as to the sale of a slave very similar to that of the unsound horse in *Street* v. *Blay*. (1) And, as we apprehend, the principle of our law is the same as that of the civil law; and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.

Some cases were referred to on the argument, in which the question was, whether a stipulation in a contract was a condition precedent or not. Those cases are, no doubt, analogous, as the question in such cases very much depends on whether the stipulation goes to the root of the matter or not; but they are only remotely analogous; and after all, the decisions can never do more than illustrate the principle, and the question must depend on the construction of the contract and the particular circumstances of the particular case.

In the present case the prospectus states that the issue of the new shares was authorized by a meeting. Had that been a mistake, we think it would have been in the substance, as the applicant would not have had shares at all; but that statement was

(1) 2 B. & Ad. 456.

quite accurate, and he got shares in the company. It was stated in the prospectus that the motive for the increase of the capital was to enable the company to work the new contract. That also was strictly accurate. It was, by implication, stated that the contract was binding, and this was a mis-statement, though an innocent one; but we do not think that it affected the substance of the matter, for the applicant actually got shares in the very company for shares in which he had applied; and that company has, by means of the invalid contract, got the benefit, and is now carrying the mails on terms, not the same as those they supposed, and perhaps not so profitable, but still on profitable terms; and the shares obtained in the company, such as it is, are far from being of no value: indeed, the fall of 2*l.* per share, which is stated in the case to be the discount at the time of action brought, is not greater than may be very well accounted for by the change of times, quite independently of the dispute about the contract. We think there was a misapprehension as to that which was a material part of the motive inducing the applicant to ask for the shares, but not preventing the shares from being in substance those he applied for.

And we are a good deal influenced by the consideration that, from the nature of the company, those who applied for the new shares must have known that the increased capital was wanted at once to build fresh ships, and meet other expenditure for the purpose of working the contract; and that all such contracts must be exposed to risk of repudiation, whether justified in law or not; and that if the new shareholders are set free, the existing shareholders must be left subject to liabilities incurred on the faith of their subscription. These would not be legitimate considerations if there had been fraud in those acting for the company; doubtless, in such a case the company must bear all the consequences of the fraud of those they employ. But if the question be, as we think it is, whether the misapprehension as to the contract goes to the root and substance of the matter, so as to make the shares which the applicant has obtained in a company with this questionable contract substantially different things from shares in a company with a valid contract, we think those considerations are legitimate; and they lead us to the conclusion that the case is analogous to that of

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the horse supposed to be sound and not really so, and not to the case of a thing substantially different.

It follows that in our opinion the judgment in both actions should be for the company.

Judgment accordingly.

Attorneys for Lord G. Kennedy: *Lewis & Lewis.*
Attorneys for the Company: *Cunliffe & Beaumont.*

June 10.

NASH *v.* LUCAS.

Landlord and Tenant—Distress—Entry by opening Window.

An entry into a house, for the purpose of distraining, by opening a window which is shut but not fastened, is unlawful.

A broker went with a warrant of distress for rent to the demised premises, the front door of which he found fastened. In the course of the day a man in the employ of the landlord was allowed by the tenant to enter at the front door, in order to get access to the area for the purpose of removing and repairing a grating over it which was in a dangerous state. While the repairs were going on the tenant left the house, having fastened both the front and area doors, and the man, who had got into the area to refix the grating, having refixed it found himself unable to get out. The broker suggested to the man to try the window which opened into the area and was closed. The window was found to be unfastened, and the man pulled the sash down, got into the house, and unfastened the front door from the inside. On the front door being thus opened, the broker entered and distrained:—

Held, that the transaction must be taken as one, and that, as the entry was by opening a window, the distress was unlawful.

Quære, whether, if the door had been unfastened and opened by an independent third person, the entry by the broker would have been lawful.

DECLARATION, for breaking and entering the plaintiff's house and taking and converting her goods.

Plea, not guilty, by statute 11 Geo. 2, c. 19, s. 21.

Issue joined.

At the trial before Lush, J., at the sittings in Middlesex, during the present term, it appeared that the defendant was the assignee of the reversion of a house, 36, Prince's Road, Bayswater, and the plaintiff was the assignee of the lease, or, at any rate, in occupation of the house. On the 26th of March, 1867, rent being then due, the defendant gave a warrant to a broker named Cruik-

shank to distrain on the premises, and the defendant himself accompanied him. The doors of the house were closed, and the plaintiff, knowing his object, refused to admit Cruikshank. There had been complaints of the dangerous state of the bars of the grating over the area of the premises, and the defendant, on the same day, sent a blacksmith to remove the grating in order to mend it; this the plaintiff allowed to be done, and she admitted a man in the service of the defendant, named Back, through the front door, and so out by another door into the area, to assist in the removal. Back remained for some hours guarding the area, and on the grating being repaired he got into the area to assist in replacing the grating. The plaintiff in the meantime had fastened the area door on the inside, and had left the house by the front door, closing and fastening it after her. When the grating had been refixed, Back found the door of the area fastened, so that he could not get out; and Cruikshank, the defendant being also present, suggested that Back should try whether the window of the house which looked into the area and was closed could not be opened from the outside. The window was found to be unhasped, and Back pulled the sash down and so got into the house through the window, and out by the front door, which he unfastened from the inside. On the front door being thus opened, Cruikshank, the broker, entered and distrained the plaintiff's goods.

A verdict was returned for the plaintiff for 6*l.* 13*s.* 6*d.*, the amount which she had had to pay to release her goods, together with damages for their detention, leave being reserved to enter a verdict for the defendant if the Court should be of opinion that the distress was legal.

H. T. Cole, Q.C., moved accordingly. The entry by the open door for the purpose of distraining was legal; it matters not how the door came open, so that the person distraining did not break it open. Secondly, if it is to be taken that the broker was so connected with the entry by the window as that the entry must be taken to have been by the window, this entry also was legal: as the window, though closed, was not fastened—and the door and window stand on the same footing—either may be opened so that there be no breaking. In Com. Dig. tit. Distress (A 3.) it is said:

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"A distress may be in a house through the doors or windows;" citing 1 Roll. Abr. 671, where the expression is, "per ostia et fenestras." In *Hancock* v. *Austin* (1), Erle, C.J., says: "It is established law that a landlord may enter upon the demised premises in the ordinary way to levy a distress; but if he use *any force* to break open the door, *or to open a window which is fastened*, and so effect an entrance, he commits a trespass." The Chief Justice, therefore, was of opinion that a window might be opened, if unfastened, so long as no force was used.

[COCKBURN, C.J. That inference is scarcely to be deduced from the language in the Law Journal; but in the Common Bench Reports (2) the language is very different, and admits of no such inference: "I am of opinion the landlord had no right to enter in the way he did, the window being fastened with a hasp."]

In *Sandon* v. *Jervis* (3), an arrest by the officer putting his hand through a broken pane of glass was held legal, as the jury found that the officer did not himself break it, although it was broken in a scuffle to which the officer was a party.

[COCKBURN, C.J. In *Tutton* v. *Darke* and *Nixon* v. *Freeman* (4), the Court of Exchequer seem to have been of opinion that an entry by an open window was legal: that is going very far; but here the window was shut. In Gilbert on Distress, it is said: "If there be a house on the land a distress may be made in the house, if the outer door be open, or if the window be open a distress may be taken out at it." (5) That shews that in more ancient times greater strictness was observed, at least, an entry by opening the door or the window was thought illegal.]

(1) 32 L. J. (C.P.) 252, 254. (a)

(2) 14 C. B. (N.S.), at p. 639. (a)

(3) E. B. & E. 935, 942; 27 L. J. (Q.B.) 279; 28 L. J. (Ex.) 156. (b)

(4) 5 H. & N. 647, 653; the report 29 L. J. (Ex.) 271, does not notice the point as to the open window. (c)

(5) Page 56, ed. of 1823 by Impey: the passage does not occur in the treatise as originally published in 1757; but the authority for the passage cited in the note, 1 Roll. Abr. 671 (tit. Distress, M.), seems to bear it out. In Roll. Abr. tit. Distress, M., it is said: "1. A distress for rent may be taken in a house, if the door be open, otherwise not: 46 Edw. 3, 26 b. . . . 7. A man may distrain for the rent of a house per ostia et fenestras. Amongst the Petitions of Parliament of 18 Edw. I, folio 7, it is said that he may distrain per ostia et fenestras prout moris est. Semble by this is intended that he may go to the door and take a distress, or take it out of the windows" (hors del fenesters).

(a) See 10 Jur. (N.S.) 78. (b) 4 Jur. (N.S.) 787, 5 Jur. (N.S.) 860
(c) 6 Jur. (N.S.) 983.

There seems in modern times to be no distinction between the door and window, as long as the entry is effected without violence. In *Ryan* v. *Shilcock* (1) it was held lawful to effect an entry by removing the staple of the door, which was fastened by a padlock, that being the way the occupier himself was in the habit of gaining access to the building.

[LUSH, J. If you are lawfully on the premises you may distrain. The ground of holding entry through a closed but unfastened door to be lawful, is, that access through the door is the usual mode of access, and that the licence from the occupier to any one to enter who has lawful business may therefore be implied from his leaving the door unfastened. Entry through a window is not the usual mode of entry, and therefore no such licence can be implied from the window being left unfastened.]

That principle is not applicable to the case of *Sandon* v. *Jervis* (2), in which the arrest was accomplished through a window broken in a scuffle between the officer and the execution debtor.

[COCKBURN, C.J. The American courts seem to take a different view of the law from the later English authorities. In *Curtis* v. *Hubbard* (3) it was decided that a sheriff's officer might not even lift the latch of a door that was shut.]

COCKBURN, C.J. I am of opinion that the rule must be refused. It is quite unnecessary to decide, if the defendant and the broker had not been parties to the original trespass, whether, on the door being opened by a third person, the entry for the purpose of making the distress would have been lawful. Here the broker himself suggests to Back to open the window and get into the house, and so out by the front door, and the defendant himself was present, and the broker afterwards enters on the door being opened by Back as the broker had suggested. It must therefore be taken that both the defendant and the broker were parties to the trespass, or act, whereby access was obtained. Now the act, or trespass, was opening the window, which was closed but not fastened. Mr. Cole contended that it is lawful to open a window, provided you do not break anything. The old authorities do not go

(1) 7 Ex. 72; 21 L. J. (Ex.) 55. (Q.B.) 279; 28 L. J. (Ex.) 156.

(2) E. B. & E. 935, 942; 27 L. J. (3) 1 Hill's Rep. (New York) 336.

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so far as the more modern. The later authorities say you may open a door which is only fastened by a latch: that I think was going a very long way; and I am not surprised that in America the courts have not pursued the same course as the English Court of Exchequer. In Chief Baron Gilbert's time it would appear that a landlord could not open an outer door for the purpose of distraining if it were shut. (1) The Court of Exchequer have held that he might open a door which was closed but not fastened (2); and if a man leaves his door unfastened there may be an implied licence to any one who has business to enter the premises. But that must stand on its own ground; the principle will not apply to a closed but unfastened window. Again, it has been said that you may go in at an open window to make a distress. (3) But it is nowhere said you may open a window for the purpose. In *Sandon* v. *Jervis* (4) the officer touched the execution debtor by putting his hand through a pane of glass in a window which had been broken in a scuffle to which the officer was a party, though the pane was not broken by him, and it was held a legal arrest. That case also stands on its own particular ground; and the Court do not go further and say the officer would have been authorized to open the window if not fastened, but only that the window being already open, the arrest was lawful. Therefore the authorities are limited in application either to the case, where the door is shut but can be opened without violence, or where the window is open and can be entered without doing any violence. But if the window be shut, you are doing violence if you open it, when neither directly nor impliedly is the entry made by the licence of the owner of the house. The entry here was therefore unlawful, and the rule must be refused.

MELLOR, J. I am of the same opinion. The cases seem to me to have gone quite far enough. But there is no case which decides that a landlord, with a view to distrain, may open a window which is shut but not fastened. As to the point that the entry of the broker was by the door, and therefore legal: in *Sandon* v.

(1) See ante, p. 592, note (5).

(2) In *Ryan* v. *Shilcock*, 7 Ex. 72; 21 L. J. (Ex.) 55.

(3) See *Nixon* v. *Freeman*, 5 H. & N. 647, 653; see ante, p. 592, note (5).

(4) E. B. & E. 935; 27 L. J. (Q.B.) 279; 28 L. J. (Ex.) 156.

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Jervis (1), Hill, J., says:—"It was also argued that the officer, by putting his hand through the broken pane, had violated the privilege of the house. But the pane was not broken by him; and I think that the officer, touching the plaintiff through the pane, had as much right to make the arrest through the pane as he would have had to go at once into the house and make the arrest if the door had been left open by the owner, or even broken by third parties and then left open." That proceeds on the assumption that the officer had had nothing to do with the breaking. Now the broker here recommends the mode of entry which led to his subsequent access to the house by the open door, and therefore the case is distinguishable; consequently as the entry must be taken to have been through the window, the distress was not lawful, and the plaintiff is entitled to keep her verdict, and the rule must be refused.

SHEE and LUSH, JJ., concurred.

Rule refused.

Attorney for plaintiff: *George Biller.*

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June 13.

Marine Insurance—Concealment of material Fact by Assured—Means of Knowledge of Underwriter.

A person proposing a marine insurance is bound to communicate every fact within his knowledge that is material; though, if a particular fact be known to the underwriter at the time, he cannot afterwards set up as a defence to an action on the policy that the fact was not communicated; but if a material fact be not communicated, which, though known to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; and it is not enough for the assured to shew that the particulars supplied by the assured, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated.

During the late American war, in 1863–4, the *Georgia* screw steamer obtained notoriety as a cruiser in the service of the Confederate States; in May, 1864, she put into Liverpool, where she was dismantled, and this was also a subject of public notoriety, and, as such, known to the defendant, an underwriter at Lloyd's;

(1) E. B. & E. at p. 942; 27 L. J. (Q.B.) at p. 282.

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at Liverpool she was bought by the plaintiff at public auction, and converted by him into a merchant vessel. In August, 1864, the plaintiff, through his broker in London, effected with the defendant an insurance of the vessel for six months. The particulars furnished by the plaintiff were, *Georgia*, S.S., chartered on a voyage from Liverpool to Lisbon and the Portuguese settlements on the west coast of Africa and back. The vessel sailed from Liverpool, and was immediately captured by a frigate of the United States. In an action on the policy to recover for the loss, the defendant set up as a defence the concealment of the fact that the *Georgia* proposed for insurance was the late Confederate war steamer, and therefore liable to capture by the United States. The jury found, that the defendant was not aware that the *Georgia* which he was insuring was the Confederate steamer, but that he had, at the time of underwriting, abundant means of identifying the ship from his previous knowledge coupled with the particulars given by the plaintiff:—

Held, that the defendant was entitled to the verdict.

DECLARATION on a policy of marine insurance, for six calendar months, on the screw steamer, *Georgia*, subscribed by the defendant for 100*l*., claiming a total loss.

Plea, that the defendant was induced to effect the insurance, and to subscribe the policy, by the wrongful and improper concealment, by the plaintiff and his agents, from the defendant of certain material information, then known to the plaintiff and his agents, and unknown to the defendant, and which ought to have been communicated to the defendant.

Issue joined.

At the trial before Cockburn, C.J., at the sittings in London, after Michaelmas Term, 1866, the following facts were proved:— The plaintiff is a shipowner at Liverpool, and the defendant is an underwriter at Lloyd's. A vessel called the *Japan* was built at Dumbarton in 1863. Shortly afterwards she was fitted out as a vessel of war, on behalf of the government of the Confederate States of America, and her name was changed to the *Georgia*. For about a year she was employed as a cruiser, and became very notorious in this service; but on the 2nd of May, 1864, she put into Liverpool, and was there dismantled; this was a fact of general notoriety at the time. She was put up to sale by public auction, and purchased by the plaintiff for 15,000*l*. The plaintiff fitted her out as a merchant vessel, at an expense of 4000*l*. or 5000*l*.; and chartered her on the 28th of July, 1864, to the agent of the Portuguese government for a period of four months, to trade from Liverpool to

Lisbon, and from thence to the Cape de Verde Islands and the Western Coast of Africa.

On the 27th of July, 1864, the plaintiff wrote from Liverpool to Bradford & Co., insurance brokers, in London:—

"At what rate can you do me the hull of the S.S. *Georgia* for four months, chartered to proceed on the following voyages:—From Liverpool to Lisbon, and from thence to Cape de Verde, Principe, St. Thome, Benguela, Loando, Massamade, Ambriz, and return to Lisbon, calling at all ports as ordered."

To which Bradford & Co. replied:—

"We presume the *Georgia* is the Confederate boat, and the voyage the Portuguese mail service; if so, we should think the four months would be from three to four guineas per cent., but it is rather a guess on our part. The company's steamers doing that work were insured at seven guineas the year, but there was a batch of them, whereas this is a single matter. We should be glad to secure you the best possible terms, and, if you send an order, please say all you can of the vessel's condition, and any particulars that may assist us."

On the 1st of August, 1864, the plaintiff wrote to Bradford & Co.:—"Annexed I beg to hand you particulars of the voyage of the *Georgia*; if you can insure her at 3½ guineas per cent., for six months, please do so to the extent of 23,000*l*. Captain Wittycombe, who is to command, has been master at times of nearly all my ships, and is at present overlooking her.

"*Georgia*, S.S. Built by Denny & Co., at Dumbarton, in 1863, 427 tons register, 200-horse power, Captain Wittycombe,—for and during the space of six calendar months, commencing on the 7th of August, 1864, at all times and in all places, and on all lawful service, Liverpool to Lisbon, there and thence to Cape de Verde, Principe, St. Thome, Benguela, Loando, Massamade, Ambriz, and back to Lisbon [and or] Liverpool, calling at above named places on the return voyage—ship valued at 23,000*l*.

"I think the underwriters know W. F. Wittycombe very well. He has been master in my ships for sixteen years, built many of them, and up to this moment has never cost underwriters on his ship a shilling. If not done telegraph to me."

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Bradford & Co. telegraphed to the plaintiff that they could not insure the *Georgia* at his limit, but could do so at four guineas. Eventually they effected (amongst other policies) an insurance at Lloyd's, on the 6th of August, for 6000*l.* on the *Georgia* steamer, for six months from her sailing, at four guineas per cent., of which the defendant underwrote 100*l.* It is customary for time policies effected at Lloyd's to contain a memorandum that the insurance is free of capture and seizure, but this clause was omitted in the present policy. The letters of the 27th of July, and of the 1st of August, with the particulars, were shewn to the defendant and the other underwriters at the time they underwrote the policy.

The defendant stated, at the trial, that he knew that a vessel called the *Georgia* had been in the Confederate service as a war steamer, and that she had been sold at Liverpool; but that these facts were not present to his mind at the time he underwrote the policy, and that he did not know that he was asked to insure and was insuring the Confederate *Georgia;* and had he known that the vessel in question was the *Georgia* which had been in the Confederate service, he would not have insured her. He also admitted that he did not observe that the policy was not free of capture and seizure; and he stated that Bradford & Co. were the brokers for a company who had steamers running to the Mediterranean, and being under the impression that he was insuring one of these steamers he did not give much attention to the plaintiff's letters and particulars.

The vessel sailed from Liverpool, upon her voyage, on the 8th of August, and was captured on the 15th by a frigate of the United States of America.

The following is the statement furnished to the parties by the Chief Justice, of his direction, and the questions he left to the jury and their finding:—

"I direct the jury:

"1. That the fact of the *Georgia* having been a Confederate war steamer was a material fact.

"2. That that fact not having been communicated to the insurer, the verdict must be for the defendant, unless defendant knew the fact, or had the means of knowledge of which he ought to have

availed himself (this point, however, being subject to the leave reserved).

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"3. That it is immaterial that the defendant may have previously been aware that the Confederate steamer *Georgia* was at Liverpool, so that if he had remembered it he would have known the vessel proposed to be insured was the same, if he had forgotten his former knowledge: as the knowledge must be not a past but a present one.

"I leave to the jury:

"1. Whether the defendant had a present knowledge of the identity of the vessel.

"2. If not, whether taking the previous knowledge of defendant as to the Confederate *Georgia* being at Liverpool, and the particulars disclosed by the slip and memorandum accompanying it, defendant, by the exercise of ordinary intelligence and knowledge of his business, might have known that this was the Confederate *Georgia*."

"Verdict: The jury are not satisfied that defendant was aware of the fact that the *Georgia* proposed for insurance was the former Confederate cruiser; but their verdict is, that he had abundant means of identifying the ship at the time of underwriting the ship.

"In answer to a question from me, the jury added that the means of knowledge referred to were to be found in the slip itself. On this finding I directed the verdict to be entered for defendant, subject to leave reserved." (1)

A rule was accordingly obtained to enter a verdict for the plaintiff, on the ground that on the finding of the jury the plaintiff was entitled to have the verdict entered for him.

A cross rule was obtained on behalf of the defendant for a new trial (in the event of this Court, or a Court of Appeal, holding that the finding of the jury amounted to a verdict for the plaintiff), on the ground that the verdict was against the evidence.

May 30. *James, Q.C., T. Jones, Q.C.,* and *Sir G. Honyman, Q.C.,* for the defendant, shewed cause against the rule to enter the verdict for the plaintiff. The verdict was rightly entered for the defendant. It will be conceded on the other side that

(1) See also the judgment of the Chief Justice, post, p. 604.

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the *Georgia* was a vessel which had been employed by the Confederate States on a service which exposed her to capture in the hands of a neutral subject. It will be further conceded that the plaintiff knew this fact, and that it was a material fact, which ought to have been communicated to the defendant; and the jury have found that the defendant did not actually know the fact, except so far as he may be charged with knowledge through the memorandum enclosed in the letter of August 1st, to Bradford & Co. Then the question is, does the description of the vessel, as given on the face of the memorandum, shew that she had been the Confederate cruiser *Georgia?* It is clear it does not. It is well-established law that in contracts of insurance the strictest good faith must be observed, and the person proposing the insurance is bound to communicate every material fact which he knows, and the underwriter does not know. To this rule there are some exceptions—the insured need not mention what the underwriter knows, or what in the ordinary course of his business he ought to know: *Carter* v. *Boehm.* (1) By not communicating to the defendant the fact that the *Georgia* had been in the Confederate service, the plaintiff was guilty of a concealment which vitiated the policy. Concealment is defined, in Phillips on Insurance, s. 531, to be "Where one party suppresses or neglects to communicate to the other a material fact, which, if communicated, would tend directly to prevent the other from entering into the contract, or to induce him to demand terms more favourable to himself, and which is known, or presumed to be so, to the party not disclosing it, and is not known, or presumed to be so, to the other." The underwriter is not bound to use any extraordinary diligence in finding out the facts which would enhance the risk; but if he suspected that there had been a concealment, and chose not to ask lest he should know, then he might be liable on the policy: *Oakeley* v. *Ooddeen.* (2) In *Foley* v. *Tabor* (3) it was sought to avoid an insurance on the ground that the assured had concealed from the underwriter the charter under which the ship was to carry iron, not exceeding her registered tonnage; the underwriter knew the vessel would carry iron, but he did not know

(1) 3 Burr. 1905, 1910.
(2) 2 F. & F. at p. 659.
(3) 2 F. & F. 663, 672.

the quantity; he might, however, have ascertained this by referring to a book at Lloyd's, in which the cargoes of insured ships were entered. Erle, C.J., in summing up the case to the jury, laid it down: "The material fact must have been known to the assured, and unknown to the insurer. As to the latter point, actual knowledge is not essential, if the insurer knew he had the means of knowing the fact." The law, however, laid down by Erle, C.J., goes farther than that decided by other cases. In no case has it ever been decided that the means of knowledge an underwriter may have is equivalent to knowledge. In the case of *Central Railway Company of Venezuela* v. *Kisch* (1) the Lord Chancellor says: "It appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector: 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'" The defendant has accepted the risk on the faith of the representations made to him by the plaintiff, and he was not bound to make further inquiries; if the representations are not true, or the information is not as full as it ought to have been, the contract of insurance is void; and it is no answer to the underwriter's objection, that there has been a concealment, to say that he might have known the truth by proper inquiry.

June 3. *Milward, Q.C.*, and *Potter*, in support of the rule. No doubt the identity of the *Georgia* insured with the Confederate *Georgia* was a material fact; but the fact was notorious that the late Confederate vessel was at Liverpool, and the information afforded to the defendant by the memorandum was amply sufficient to put him upon ascertaining the identity, even if it did not, in fact, disclose it; and this is all that is necessary, if an underwriter chooses to lie by and make no inquiries, when the information given him naturally ought to lead to them, then he cannot afterwards set up that the material fact was not disclosed to him. The cases go

(1) Law Rep. 2 H. L. 99, 120.

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much farther than that actual knowledge on the part of the assurer alone excuses the assured from not disclosing a material fact. Thus, in *Carter* v. *Boehm* (1), it is said by the Court: "the insured need not mention what the underwriter ought to know;" and in *Noble* v. *Kennoway* (2) it was held that an underwriter is bound to know everything that is generally known in regard to a particular branch of trade; or a particular voyage: *Stewart* v. *Bell.* (3) In 2 Duer on Marine Insurance, p. 555, the information contained in Lloyd's Lists is given as an instance of what an underwriter is bound to know; but actual misrepresentation by the assured, though inconsistent with the lists, will prevent the assured from recovering: *Mackintosh* v. *Marshall.* (4) Here all the representations were accurate.

[SHEE, J. Duer cites for his first proposition *Friere* v. *Woodhouse* (5); but the information here would not disclose or even lead to the identity of the *Georgia* with the Confederate steamer. In *Mackintosh* v. *Marshall* (4) there was a misrepresentation coming within the very first definition of dolus malus.]

It is quite clear on the facts that the defendant scarcely read the memorandum or the policy. Had he taken any trouble whatever to read the documents, he could not have failed of at once seeing that it was the Confederate *Georgia* that he was about to insure.

At the close of the arguments on the plaintiff's rule, the Court directed counsel to proceed with the defendant's cross rule; and at the close of the arguments on the latter rule (June 13), the Court at once pronounced judgment, discharging the plaintiff's rule to enter a verdict, intimating that they were ready to give judgment on the defendant's rule, if and when it should be rendered necessary by a Court of Appeal reversing the decision on the plaintiff's rule.

June 13. COCKBURN, C.J. I am of opinion that the verdict ought not to be disturbed. The policy of insurance upon which this action was brought was upon the steamer the *Georgia*, for

(1) 3 Burr. at p. 1910.
(2) 2 Dougl. 510.
(3) 5 B. & A. 238.
(4) 11 M. & W. 116.
(5) Holt, N. P. 572.

six months from her sailing from Liverpool, the voyage being stated in the particulars shewn to the defendant to be to Lisbon, and to the Portuguese settlements upon the western coast of Africa. The defence rested upon the ground that a material fact, which ought to have been communicated to the underwriter, to enable him to ascertain the amount of risk against which he was engaging to protect the assured, had not been communicated; the material fact being, that the vessel in question had been a ship of war in the Confederate service, which exposed her to the danger of being seized by the government of the United States.

It appeared that the vessel had been the well known Confederate cruiser, the *Georgia;* she was brought to Liverpool, and was there dismantled and sold; she was bought by the plaintiff at a public auction, he being the person proposing the vessel to be insured.

It was admitted at the trial that the fact of the vessel having been a vessel of war in the Confederate service, as she was consequently liable to the danger of being seized by the United States Government, was a circumstance material to be communicated to the defendant, the underwriter. It was clear that the fact of the vessel having been in the Confederate service was not directly, nor in terms, communicated to the underwriter; and, therefore, if the case had stood simply as I have just stated it, it is plain that, according to the well established rule of insurance law, the plaintiff would not be entitled to recover, and the defendant would have a good defence to the action. The plaintiff, however, while he admits that the fact was material to be communicated, and that it had not been communicated, contends that the case falls within a well established exception to the general rule.

At the trial, the plaintiff endeavoured to establish that the defendant, at the time that he underwrote the policy, knew the fact that the vessel he was insuring was the Confederate cruiser. In the second place, he contended, that, even if the defendant was not aware of the fact, nevertheless, taking into account the previous knowledge which he had of the Confederate cruiser being at Liverpool, and the particulars disclosed by the plaintiff in proposing the insurance, the defendant ought to have known, if he

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had properly considered the matter, that this was the Confederate vessel.

The first ground taken by the plaintiff is disposed of by the finding of the jury. In effect, the jury have found that at the time the defendant underwrote the policy, he, in point of fact, did not know that the vessel was the Confederate steamer. The plaintiff must, therefore, rely on the second ground, viz. that, taking the previous knowledge of the defendant into account, the particulars stated by the plaintiff in proposing the insurance would, if the defendant had given due consideration and attention to the matter, have brought to his mind that he was insuring the Confederate steamer. I think what passed between the jury and myself must be taken to amount to a finding by the jury in the affirmative of the question I put to them; whether, taking the previous knowledge of the defendant as to the Confederate steamer *Georgia* being at Liverpool, and the particulars disclosed by the slip and memorandum, the defendant, by the exercise of ordinary intelligence and knowledge of his business, might have known that this vessel was the Confederate steamer *Georgia*. The jury did not, in fact, directly find the affirmative or the negative of the question, but they found that the defendant had abundant means of identifying the ship at the time of his underwriting the policy; and, inasmuch as the abundant means might have been something extrinsic to the particulars communicated by the plaintiff to the defendant, I asked the jury whether they meant by their answer to say that, taking the previous knowledge and the particulars afforded by the plaintiff, the defendant had the means of knowledge; or whether they meant to say that, looking at the particulars, if he had made further inquiry he must have acquired a a knowledge extrinsically; and their answer amounts to this, coupling what was contained in the particulars supplied by the plaintiff with the defendant's previous knowledge, he had abundant means of identifying the vessel as the Confederate steamer.

Now, the question is, whether the finding of the jury entitles the plaintiff to the verdict, and I am of opinion that it does not.

No proposition of insurance law can be better established than this, viz. that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to deter-

mine the extent of the risk against which he undertakes to guarantee the assured. It is true, if matters are common to the knowledge of both parties, such matters need not be communicated. It is also true that when a fact is one of public notoriety, as of war, or where it is one which is matter of inference, and the materials for informing the judgment of the underwriter are common to both, the party proposing the insurance is not bound to communicate what he is fully warranted in assuming the underwriter already knows. Short of these things, the party proposing the insurance is bound to make known to the insurer whatever is necessary and essential to enable him to determine what is the extent of the risk against which he undertakes to insure; and I apprehend that, as to the matters which the party proposing the insurance is bound to communicate to the insurer, there is no answer to be made, except that the insurer had, at the time of entering upon the contract, knowledge of the particular fact. I do not mean to say that, if the insurer choose to neglect the information which he receives, he can take advantage of his wilful blindness or negligence; if he shuts his eyes to the light, it is his own fault: provided sufficient information, as far as the assured is concerned, has been placed at his disposal. If, indeed, the insurer knows the fact, the omission on the part of the assured to communicate it will not avail as a defence in an action for a loss; not because the assured will have complied with the obligations which rested on him to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him, which he had present to his mind at the time he accepted the insurance; the law will not lend itself to a defence based upon fraud; it will not allow the underwriter to say, "I have taken the premium with the knowledge of the particular fact, but because the assured has not communicated it to me I will not make good the loss." Therefore, if the fact be known to the underwriter, he cannot avail himself of the circumstance that it was not communicated by the assured; but putting that aside, it is the duty of the assured to make known to the insurer whatever is material with regard to the extent of the risk.

It is admitted that a fact was not communicated to the underwriter in such a shape, or in such an abstract form, as that, in-

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dependently of something extrinsic to the communication itself, it would afford him the necessary information. But it is said: "The underwriter had previous knowledge of the fact of the Confederate steamer *Georgia* being at Liverpool; he also knew she was there for the purpose of being dismantled and sold." We must, however, take it, on the oath of the defendant and the finding of the jury, that those facts were not present to the defendant's mind at the time he underwrote the policy. The case may be put in two ways; either, that, if the previous knowledge which the defendant had with reference to the vessel had been present to his mind, that with the particulars before him would have brought to his mind the fact that he was asked to insure the Confederate steamer *Georgia;* or that, if he had carefully studied the particulars stated in the memorandum, those particulars would have brought back to his mind the knowledge which had been previously present to it, which, for the moment, had been forgotten, and the combination of the knowledge thus resuscitated and revived with the particulars contained in the memorandum would have led him to the conclusion that the vessel offered for insurance was the Confederate steamer. But the facts are to the contrary; the previous knowledge that the defendant may have had was not present to his mind; and what the defendant swore was, that the particulars did not bring that knowledge back to his mind. The result was, as the jury have found, that at the time he underwrote the policy of insurance the defendant did not know that the vessel was the Confederate steamer.

I think that we should be sanctioning an encroachment on a most important principle, and one that is vital in keeping up the full and perfect faith which there ought to be in contracts of marine insurance, if we were to hold that a party,—who is under an obligation to communicate the material conditions and facts which constitute the basis of the contract into which he invites another to enter,—may speculate as to what may or may not be in the mind of the underwriter, or as to what may or may not be brought to his mind by the particulars disclosed to him by the assured, if those particulars fall short of the fact which the assured is bound to communicate. If we were to sanction such a course, especially in these days, when parties frequently forget the old

rules of mercantile faith and honour which used to distinguish this country from any other, we should be lending ourselves to innovations of a dangerous and monstrous character, which I think we ought not to do.

The rule we find established is this: that the person who proposes an insurance should communicate every fact which he is not entitled to assume to be in the knowledge of the other party; and the assured is bound to communicate every fact to enable the insurer to ascertain the extent of the risk against which he undertakes to protect the assured. True, if it can be established that the insurer did know the fact, it will not lie in his mouth to say, the fact of which he had previous knowledge was not communicated; if it can be established that the underwriter had knowledge of the fact, the assured would be protected against the fraud of the underwriter in seeking, under such circumstances, to avoid the insurance. And it is also well established law, that it is immaterial whether the omission to communicate a material fact arises from intention, or indifference, or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known. I think that there is every reason to believe that both parties imagined that the fact that the vessel had been a Confederate war steamer was not a material circumstance, and the plaintiff must be exonerated from any imputation of having wilfully and intentionally kept back that material fact; because he had only a short time before bought the vessel for 15,000*l.*, and laid out 4000*l.* or 5000*l.* on her, and it is extremely improbable that he would have expended this large sum of money on her if he had supposed she was a vessel liable to seizure by the United States Government. He probably thought that when she was bought by a British subject, and had a British flag flying aboard, she was safe from capture. That turned out to be a mistake; and it is now admitted that the fact of her being thus exposed to the danger of seizure, was a material fact to be communicated, though the non-communication of it may have arisen from perfect innocence on the part of the plaintiff, and from his thinking that it was not a material fact. It is clear that there was an obligation on the part of the plaintiff to communicate this fact; it is clear that he did not commu-

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nicate it; that he had disclosed partial information, which, by possibility, if it had brought back to the defendant's mind what had previously been known to him, would have led him to the knowledge that this was the Confederate steamer *Georgia;* or if, on the other hand, he had the knowledge present in his mind, he might have read the particulars communicated to him in a different light from that in which he read them. It is laid down as a general proposition, that the party proposing the insurance, if he has omitted a material fact, can only enforce the insurance which, from the omission to communicate the fact, would otherwise be avoided, in the event of the jury finding by their verdict that by means of what he did communicate, coupled with any other fact that then might be present to the mind of the insurer, the latter knew at the time he granted the insurance the fact which it was the duty of the assured to communicate.

Taking, therefore, the finding of the jury in the most favourable sense for the plaintiff, we think that the verdict entered for the defendant is right, and should not be disturbed, and that this rule should be discharged.

MELLOR, J. I am of the same opinion. I think the verdict entered for the defendant must stand. It is of the greatest importance to abide by the cardinal rules which have prevailed on this subject since the judgment delivered by Lord Mansfield in the case of *Carter* v. *Boehm* (1); and it would be most dangerous, as it appears to me, to allow those well established rules to be frittered away by the introduction of doubtful equivalents. I cannot help thinking that to enable a person proposing an insurance to speculate upon the maximum or minimum of information he is bound to communicate, would be introducing a most dangerous principle into the law of insurance.

The plaintiff proposed a vessel, the *Georgia*, to the defendant for insurance. It is conceded that the history of this vessel was perfectly well known to the plaintiff, and that she was, in fact, the Confederate cruiser, the *Georgia*. It was admitted by the plaintiff's counsel that this was information material to have been communicated to the defendant, but it was urged that the information was in substance

(1) 3 Burr. 1905.

afforded by the terms of the letters and the slip, and that the defendant, had he taken any reasonable trouble in reading and considering these documents, could not have failed to know that the vessel in question was the *Georgia*, the Confederate cruiser. The jury found that, in point of fact, the defendant did not know that such was the case; but they were of opinion that if he had read the documents with reasonable care, they, coupled with his previous knowledge of the history of the Confederate steamer, the *Georgia*, and the exercise of ordinary intelligence and reflection, would have afforded to him abundant means of knowledge that the vessel in question was the Confederate vessel. Notwithstanding this opinion of the jury, it appears to me that we should be introducing the very mischief to which I have referred, if we were to hold that a party proposing an insurance was under no obligation to communicate a material fact, known to him, but unknown to the other party, on the ground that such party might peradventure, by an effort of memory and of reasoning applied to the information actually communicated, have arrived at the knowledge of the fact so material.

Lord Mansfield, in *Carter* v. *Boehm* (1), says: "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. *The keeping back such circumstance is a fraud, and, therefore, the policy is void.* Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood, and intended to be run, at the time of the agreement." That lies at the root of the whole matter. Lord Mansfield then goes on to say: "There are many matters as to which the insured may be innocently silent; he need not mention what the underwriter knows,—scientia utrinque par pares contrahentes facit. An underwriter cannot insist that the policy is void because the insured did not

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(1) 3 Burr. at pp. 1909, 1910.

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tell him what he actually knew; what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of." Then Lord Mansfield goes on to illustrate that doctrine by referring to a variety of matters which lie equally within the knowledge of both parties; everything else the assured must communicate. It is not enough that the underwriter be furnished with materials from which, by a course of reasoning and an effort of memory, he may be induced to suspect that the vessel is a dangerous risk. The matter must not be left to speculation or peradventure. So far as I know, the judgment of Lord Mansfield has never been qualified or questioned. The only part of it upon which any doubt has been raised is, as to the admissibility in evidence of the opinions of brokers, who are in the habit of negotiating policies of insurance, as to the materiality of facts not communicated. (1) That judgment rests on a sound principle, and has always been considered as laying down the true rules which govern the law of insurance.

I concur in the conclusion at which the Lord Chief Justice has arrived; and I say that if we were to enter a verdict for the plaintiff, we should be giving countenance to the substitution of doubtful equivalents in lieu of actual and plain communications; and this we ought to discourage to the utmost of our power.

SHEE, J. I am of the same opinion. The principle on which the law of concealment, as it relates to marine insurances, rests, is, that in bargaining for an insurance, the person proposing the insurance should take care that the underwriter is as well informed as he himself is of all those circumstances which would increase the risk which he offers to the underwriter. He is not bound to communicate things which are well known to both. He is not bound to communicate facts or circumstances which are within the ordinary professional knowledge of an underwriter. He is not bound to communicate facts relating to the general course of a particular trade; because all these things are supposed to be within the knowledge of the person carrying on the business of insurance, and which, therefore, it is not necessary for him to be

(1) See the notes to *Carter* v. *Boehm*, 1 Sm. L. C. 4th ed. 422.

specially informed of. But the person proposing the insurance is bound to communicate to the person whom he asks to undertake the insurance everything within his knowledge, which is of a nature to increase the risk which the underwriter is asked to undertake.

In this case, there was a fact especially within the knowledge of plaintiff, viz. that this vessel had been a Confederate cruiser. The plaintiff did not know that that fact was of a nature to increase the risk: it was, however, of a nature to increase the risk, because the vessel was, from having been a Confederate cruiser, liable to seizure by the government of the United States; that was a fact material to the risk, which the person proposing the insurance knew, and which the person to whom the insurance was proposed did not know. The parties, therefore, while they were considering what one would be willing to give for the protection which he desired, and what the other would be willing to take for giving him that protection, were not upon equal terms; they had not an equal amount of knowledge; and the reason that they had not an equal amount of knowledge was, that the plaintiff kept back a material fact which he well knew.

It was argued by the plaintiff's counsel, that it is enough if the person to whom the insurance was proposed had the means of knowing the material fact. No authority was cited for that proposition. No doubt there are cases in which it has been held, where the underwriter has the means, by merely looking at lists which are hung up in the room where the insurance is effected, of ascertaining a particular fact, it is not necessary that it should be communicated. In *Friere* v. *Woodhouse* (1) it was ruled that information contained in Lloyd's lists need not be communicated to the underwriter, as by fair inquiry and due diligence in his business he could have ascertained the facts they contained. But the facts of the present case are very different. The underwriter had no means of presently knowing the fact not communicated to him; he might by possibility, if he had instituted inquiries, have found it out: but that he is not obliged to do. The person who proposed the insurance knew the fact, and it was a fact material to the estimate of the risk, and he ought to have communicated it.

(1) Holt, N. P. 572.

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For these reasons, it appears to me that the plaintiff was guilty of concealment, and the verdict ought not to be disturbed.

Rule discharged.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Rawle, for Hull, Stone, & Fletcher, Liverpool.*

Attorneys for defendant: *Thomas & Hollams.*

June 18.

[IN THE EXCHEQUER CHAMBER.]

BARRACLOUGH *v.* GREENHOUGH.

Evidence—Probate of Will, how far Evidence as to Realty, under 20 & 21 *Vict. c.* 77, *s.* 64—*Practice—Service of Notice in a Cause.*

6 C.B. 96. 17 & 18 Vict. c. 47.

By s. 64 of 20 & 21 Vict. c. 77, in any action or suit, where, under the existing law, it would be necessary to produce and prove an original will to establish a devise of real estate, the party relying on the devise "may give to the opposite party, ten days at least before the trial, notice that he intends to give in evidence, as proof of the devise, the probate of the will, and such probate shall be *sufficient* evidence of the will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, unless the party receiving the notice, within four days after the receipt, give notice that he disputes the validity of the devise:"—

Held (reversing the decision of the Queen's Bench), that the party receiving the notice, although he had not given a counter notice within four days, was not precluded at the trial from contesting the validity of the will.

Quære, whether the notice ought not to be served on the attorney in the cause, and whether service on the party is sufficient.

APPEAL from the Court of Queen's Bench. The case is reported ante, p. 1. The following is the case as agreed by the parties:—

This is an appeal by the plaintiff against the decision of the Court of Queen's Bench, in refusing a rule to set aside a nonsuit, and for a new trial, on the grounds of the judge having erroneously ruled, first, that the probate of the will of Ann Thomas, produced at the trial, was conclusive evidence of the validity and contents of the will under the circumstances hereinafter set forth; secondly, that the notice served by the defendant upon the plaintiff was a good and sufficient notice, sufficiently served within the meaning of the Probate Act.

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This was an action of ejectment. The plaintiff was the devisee of John Barraclough, heir-at-law of Ann Thomas, who died possessed of certain messuages and tenements in Bradford, in the county of York; which, at the time of action brought, were in the possession of the defendant. The defendant claimed as devisee of Ann Thomas, under a will alleged to have been made by her on the 13th of May, 1860, the day before her death.

The sole question in dispute between the parties was the testamentary capacity of Ann Thomas on the 13th of May, 1860.

The writ was issued on the 15th of June, 1866. The appearance was entered on the 5th of July, 1866. The cause was tried at the Leeds summer assizes, 1866, which began on the 3rd of August. (1) More than ten days before the day of the trial, viz. on Saturday, the 14th of July, 1866, the following notice was served upon the plaintiff, personally, at Bradford, in Yorkshire, where she resides:—

"In the Queen's Bench.

Between

H. Barraclough, claimant; W. Greenhough, defendant.

Take notice, that the defendant in this cause intends to adduce in evidence, on the trial thereof, the probate of the will of Ann Thomas, late of Bradford, in the county of York, widow, deceased, bearing date the 13th of May, 1860, proved in the district registry of Wakefield, attached to Her Majesty's Court of Probate, on the 8th of June, 1860, stamped with the seal of the said court, as proof of the devise or other testamentary disposition by the said testatrix to the said defendant, and to Mary, his wife, of the hereditaments and premises situate at Bradford aforesaid, more particularly described in the issue joined in this action, and to the possession of which the above named claimant claims to be entitled, and for the recovery of which this action is brought.

Dated this day of July, 1866.

W. Lancaster, defendant's attorney.

To H. Barraclough, the above named claimant, and to W. P. Roberts, Esq., her attorney."

No copy of such notice was served either upon Mr. W. P.

(1) That being the commission day.

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Roberts, the attorney for the plaintiff, or on Mr. Chinery, his London agent, who was the attorney upon the record.

On receipt of the notice, the plaintiff forwarded it to her attorney, Mr. Roberts, at Manchester, where he resides; and on the 21st of July, 1866, Mr. Roberts, as attorney for the plaintiff, caused to be served on the defendant, personally, the following notice:—

"In the Queen's Bench.

Between

H. Barraclough, plaintiff; W. Greenhough, defendant.

Take notice, that the above named plaintiff disputes the validity of the will of Ann Thomas, late of Bradford, in the county of York, widow, deceased, bearing date the 13th of May, 1860, and every devise or other testamentary disposition therein contained by the said testatrix to the said defendant, and to Mary, his wife; and the said plaintiff will, on the trial of this cause, contend that the said will was altogether procured by fraud, and the said defendant is hereby required to produce on the said trial the original document purporting to contain the said will, and also the two witnesses who assumed to attest the signature thereto of the said testatrix.

Dated the 21st day of July, 1866.

Yours, &c.,

W. P. Roberts, plaintiff's attorney,

44, Princes Street, Manchester.

To Mr. Greenhough, the above named defendant, and to W. Lancaster, Esq., his attorney."

On the 23rd of July, 1866, a duplicate copy of the above notice was served upon the defendant's attorney, Mr. Lancaster.

The cause came on to be tried, before Mellor, J., at the assizes at Leeds, which commenced on the 3rd of August, 1866. The defendant's counsel admitted the plaintiff's title, and claimed the right to begin. He then opened his case, and, putting in the notice first above mentioned, tendered the probate of the alleged will of Ann Thomas, as conclusive evidence of the validity and contents of the will. This was objected to by the plaintiff's counsel: first, on the ground that the statute (20 & 21 Vict. c. 77, s. 64) did not make the probate conclusive evidence, but merely evidence

open to contradiction; secondly, that the defendant was not in any way misled by the conduct of the plaintiff, and knew well that the sole question at issue was the testamentary capacity of Ann Thomas; and thirdly, that there was no sufficient notice, or service of notice, to entitle the defendant to give the probate in evidence under the statute.

The learned judge overruled the objections, and directed a nonsuit.

The questions for the Court were: first, whether the notice served by the defendant on the plaintiff, personally, was a sufficient notice within the meaning of the statute; secondly, whether the service of such notice was a sufficient service within the meaning of the statute; thirdly, whether, if the notice and service were sufficient, the counter notice served on behalf of the plaintiff was sufficient to compel the defendant to produce the alleged original will, and if so, whether the notice was sufficiently served; fourthly, whether the statute, under the circumstances stated, made the probate conclusive evidence of the will, and of its validity and contents. (1)

Gibbons (*J. M. Moir* with him), for the plaintiff. The construction put by the Queen's Bench on s. 64 of 20 & 21 Vict. c. 77, is wrong. "Sufficient evidence" means primâ facie evidence.

[WILLES, J. Sufficient to go to the jury as proof in favour of the party producing the probate.]

The contrast of the language used in s. 62 to that used in s. 64, shews that the probate in common form cannot be intended to have the same effect as probate after proof in solemn form, the one is to be "conclusive," the other, only "sufficient." Moreover, it is to be observed that by s. 63, the probate in solemn form even

(1) 20 & 21 Vict. ss. 62 and 64 are set out, ante, p. 2, and in the judgment of the Court; s. 63 makes it unnecessary, in certain cases, to cite the heir-at-law, "provided that the probate, decree, or order of the Court shall not in any case affect the heir, or any person, in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made a party." Section 65: "In every case in which in any such action or suit the original will shall be produced and proved, it shall be lawful for the Court, or judge before whom such evidence shall be given, to direct by which of the parties the costs thereof shall be paid."

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is not to bind the heir, unless he has been cited; à fortiori, the probate cannot be intended to be conclusive when not proved in solemn form. A will is not to be lightly set up, and the rights of the heir taken away: see per Lord Camden in *Hindson* v. *Kersey*. (1) When an issue is directed out of Chancery, it is necessary to call both witnesses to the will: *Bowman* v. *Bowman* (2), per Byles, J., in *Andrew* v. *Motley* (3); it cannot have been the intention of the legislature to deprive the plaintiff of the right of having the original will produced, and examining the witnesses to the testator's competency, by an enactment like s. 64, which is only intended to give a party the opportunity of using and relying on the probate, in order to save expense.

[CHANNELL, B. The section only enables the party to read the probate in evidence as proof of a devise of realty, nothing more.]

Secondly, the notice ought to have been served on the attorney, and not merely on the plaintiff in person. In all similar cases, notices must be served on the attorney: *Howard* v. *Ramsbottom* (4); *Margettson* v. *Rush* (5); *Thompson* v. *Billings*. (6)

[CHANNELL, B. The notice is a proceeding in the cause, and, according to the general rule of practice, it ought to be served upon the attorney.]

The Court then called upon

Manisty, Q.C., for the defendant. This is not a question of concluding the heir; it is a mere question of costs. The legislature, in order to save the expense of producing an original will and calling witnesses, enables a party who claims realty under the will to put the probate in evidence, by giving notice of his intention to the opposite party; and if the latter neglect to give a counter notice, he is simply estopped in the trial of the particular action from disputing the validity of the will. Section 64 makes the probate "sufficient evidence," not only of the will—that is, of the due execution of it—but of its validity and contents, that is, sufficient for the cause, but not "conclusive" so as never to be rebutted, as it would be if proved in solemn form; and this accounts for the difference of the language in the two sections.

(1) 4 Burn's Eccl. Law. 116.
(2) 2 Mood. & Rob. 501.
(3) 12 C. B. (N.S.) at p. 527.
(4) 3 Taunt. 526.
(5) 8 Dowl. 388.
(6) 2 Dowl. (N.S.) 824.

[CHANNELL, B. This was merely an ejectment, but there are cases in which the verdict and judgment might be conclusive, so as to bind the parties, notwithstanding the will was really invalid.]

The plaintiff could always get rid of the difficulty by being nonsuited.

[PIGOTT, B. If the notice were from the plaintiff, the defendant could not so escape. The argument for the defendant amounts to reading the words "*notwithstanding* the same may not have been proved in solemn form," "*as if* the same had been proved in solemn form."]

As to the service of the notice, the section says it is to be given "to the opposite party;" service, therefore, on the plaintiff was sufficient. But the plaintiff forwarded it to her attorney, so that, in effect, the service was on the attorney.

[KEATING, J. It does not appear when Mr. Roberts received it.]

It is not stated in so many words, but he served the counter notice on the 21st of July, and that was more than ten days before the trial.

Gibbons, in reply. "Sufficient" evidence is never used in the sense of conclusive, but as "enough, unless rebutted;" "sufficient" is used as equivalent to "primâ facie" in *Rooker* v. *Rooker* (1); *Smith* v. *Young* (2); *Reid* v. *Margison* (3); and there are numerous other cases that may be cited.

[CHANNELL, B. Is there no case on a statute in which "sufficient" has occurred?

WILLES, J. In the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 119, an affidavit of service, together with a copy of the notice, is made "sufficient evidence of the notice and service," in order to save the attendance of a witness.]

In *Northhard* v. *Pepper* (4), Erle, C.J., says: "An enactment, altering the law as to evidence, and creating statutory evidence whereby the rights of parties may be defeated, must be construed strictly."

MARTIN, B. We are all of opinion that the judgment of the Court of Queen's Bench must be set aside, and a new trial granted.

(1) 33 L. J. (P. M. & A.) 42.
(2) 1 Camp. 439.
(3) 1 Camp. 439.
(4) 10 L. T. (N.S.) 782.

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The question depends on the construction to be put upon s. 64 of 20 & 21 Vict. c. 77; but that section is preceded by two other sections, which are material to shew what is the true meaning of it.

Section 62 enacts, that, "where probate of such will is granted, after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order, respectively, shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of Her Majesty's Court of Probate, shall in all Courts, and in all suits and proceedings affecting real estate, of whatever tenure, (save proceedings by way of appeal under this act, or for the revocation of such probate or administration) be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate." That is a very plain and intelligible enactment. As regarded personalty before the statute probate was conclusive, and this enactment gives the same effect to a probate, after proof in solemn form, in respect to realty as probate had before in respect to personalty. Then s. 63 makes a very proper exception as to the heir-at-law, that probate in solemn form shall not affect his interest in real estate, unless he has been cited or made a party; as no doubt he ought to have every opportunity of contesting the validity of the will. Then s. 64 enacts, "In any action at law, or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will, in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy thereof, stamped with the seal of the Court of Probate; and in every such case, such

probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

Now at the trial in the present case, the same effect was given to the probate in common form under this section, as would have been given to a probate after proof in solemn form under s. 62, by which such probate is to be "received as conclusive evidence of the contents and validity of the will, in like manner as probate is received in evidence in matters relating to the personal estate;" whereas in s. 64 no such language is used; on the contrary, it seems to be purposely avoided. The language of s. 64 is that the probate shall be "sufficient evidence." This enactment has a very useful and extensive application. It is well known in practice that it is a most expensive proceeding to produce the original will, which is in general in the custody of the Court of Probate; that Court will not trust it out of the possession of one of their officers, and the officer has often to be kept several days at the assizes. Section 64 has a most useful bearing in tending to prevent this expense. Again, it had been always necessary to produce one of the attesting witnesses, as s. 26 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), only applies to cases where attestation is unnecessary; and this provision of s. 64 appears to dispense with the necessity of calling either of the attesting witnesses, for the probate is to be sufficient evidence of the will, and of its validity and contents. But there is nothing in this section to lead to the conclusion that after notice the opposite party is not to be admitted to shew that the testator was incapable, and the will invalid. To hold that the omission to give the counter notice of an intention to dispute the validity of the will would have the effect of establishing a will, even if made by a lunatic in an asylum, would be carrying the language used far beyond its true meaning. The true meaning appears to be, when a notice has been given of the intention to use the probate in evidence, and the other side do not

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give a counter notice within four days, the probate without more will be admissible evidence of the will and its contents as to realty, and will be primâ facie evidence of the validity of the will and the competence of the testator; in other words, the probate alone will be sufficient evidence to go to the jury of a devise of realty; but there is nothing to prevent the other side from shewing, by evidence, that the will is not valid, or that the testator was not competent. That appearing to us to be the meaning of the statute, there must be a new trial in order that the case may be tried on its merits.

With respect to the service of the notice, it is unnecessary to decide whether or not the service was sufficient; but it seems very plain, from the books of practice and the expressions used in decided cases, that in cases like the present notice ought to be given to the attorney, and not merely to the party.

WILLES, KEATING, and MONTAGUE SMITH, JJ., and CHANNELL and PIGOTT, BB., concurred.

Judgment reversed, and rule absolute for a new trial.

Attorney for plaintiff: *Chinery, for W. P. Roberts, Manchester.*

Attorneys for defendant: *Torr & Co., for W. Lancaster, Bradford, Yorkshire.*

THE QUEEN *v.* BAKER.

1867
June 1.

Sewers—Sea-banks—Mortgagor, Liability of, to repair—Presentment—Costs of non-repair—23 Hen. 8, c. 5, s. 3—3 & 4 Wm. 4, c. 22.

A mortgagor, not in actual possession, but in receipt of the rents and profits of lands charged with repair of a sea-bank, is liable for default of reparation.

Notwithstanding 3 & 4 Wm. 4, c. 22, s. 15, the commissioners of sewers, under 23 Hen. 8, c. 5, s. 3, have power to repair a sea-bank, and fine the person whose lands are charged with the repairs without giving him any notice; therefore a presentment, which does not allege notice to repair, but states that the costs and charges of repairing amount to a certain sum, and a judgment thereon, ordering that payment, are good.

RULE calling upon the prosecutors to shew cause why, inter alia, a presentment found at a court of sewers held on the 3rd day of January, 1863, for the levels of the hundreds of Caldicot and Wentlodge, in the county of Monmouth, touching the liability of the defendant to repair and amend a certain sea-bank, situate in the parish of Undy, within the level of the hundred of Caldicot, should not be quashed.

Presentment. Monmouthshire to wit: The jurors of our lady the queen upon their oath present that Daniel Baker, of Crossways Green, in the county of Monmouth, esquire, and those whose estate he hath in certain messuages, farms, lands, tenements, hereditaments, and premises situate in the parish of Redwick, within the level of the hundred of Caldicot, in the county of Monmouth, from the time whereof the memory of man runneth not to the contrary, by reason of their tenure of the said messuages, farms, lands, tenements, hereditaments, and premises, have been used to repair, and of right ought to have repaired, and still of right ought to repair, a certain sea-bank distinguished on the level survey by the Nos. 37, 38, situate in the said parish of Redwick, within the level of the county of Monmouth aforesaid, and jurisdiction of this Court, and in, upon, adjoining, or near to the said messuages, farms, lands, tenements, hereditaments, and premises. And the jurors aforesaid, upon their oath aforesaid, do further present that the said sea-bank, through the neglect and default of the said Daniel Baker in that behalf, and for want of the said sea-bank being kept by the said Daniel Baker in due and sufficient repair, was heretofore, to wit, on the

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2nd day of January, in the twenty-sixth year of her present Majesty's reign, out of repair and in want of being effectually repaired and protected with stone-pitching in front thereof, to be formed of limestone and ashes, and to be 42 feet in length, by 21 feet on the slope, making in the whole 90 yards, and yet remains and continues so, down to the time of taking and finding this inquisition: and that the said Daniel Baker, by reason of his tenure of the said messuages, farms, lands, tenements, hereditaments, and premises, ought at his costs and charges well and sufficiently to repair, amend, and make good the same sea-bank, in manner and form aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present and find that the costs and charges of repairing, amending, and making good the said sea-bank as aforesaid, including the cost of cutting, foundation, and making ground for pitching will amount to the sum of 26*l.* 10*s.*

Monmouthshire to wit: Be it remembered that at an adjourned general court and session of sewers for the levels of the hundreds of Caldicot and Wentlodge, in the said county, held at the King's Head Inn, in the town of Newport, in the said county, on Thursday, the 23rd of March, 1863, by and before the Right Honourable Charles Morgan Robinson Baron Tredegar, and others, her Majesty's Commissioners of Sewers for the said levels then and there present: the presentments found at the last Court, held on the 3rd of January, were severally called over and confirmed, with the exception of No. 8, in Caldicot, against Daniel Baker, for non-repair of a sea-bank in Redwick, to which presentment the said Daniel Baker pleaded not guilty, and entered into a recognizance in the sum of 50*l.* to try his traverse with effect thereto.

Monmouthshire to wit: Be it remembered that at a general court and session of sewers for the levels of the hundreds of Caldicot and Wentlodge, in the county of Monmouth, held at the Kings' Head Inn, in the town of Newport, in the said county, on Tuesday, the 9th of January, 1866, and continued by adjournment, held by adjournment on the 10th of January in the same year, by and before Sir Thomas Philips, Q.C., and others, her Majesty's Commissioners of Sewers for the said levels then and there present, issue was joined upon the traverse of Daniel Baker, for a defective sea-wall in Redwick, presented on the 3rd of January, 1863, and

the same was entered and came on for trial before the following persons, who were then sworn on the jury, viz.: James Evans and eleven others, and thereupon the defendant was found guilty.

Whereupon the Court did impose and set a cess lot and charge upon the said Daniel Baker of the sum of 26*l.* 10*s.*, being the amount found by the jury to be the cost of repair of the sea-bank in Redwick, the subject of the said trial, and did order and direct that the said Daniel Baker should forthwith, on demand, pay to Patrick Rosser the general expenditure for the said level, the said sum of 26*l.* 10*s.*, the same having been expended by him in the repairs of the said sea-bank, and in default of payment accordingly, the Court did further order and direct the said Patrick Rosser to levy and raise the said sum of 26*l.* 10*s.* by distress and sale of the goods and chattels of the said Daniel Baker, in conformity with the provisions of the statute in that case made and provided.

It appeared from the affidavits, that at the time of the presentment before the commissioners of sewers the following facts were proved: that Daniel Baker and his predecessors in title and possession had been liable and accustomed to maintain and repair the sea-bank, a defence against the waters of the Bristol Channel, for a period far exceeding the memory of any living witness, in respect of their tenure of a messuage, farm, and lands, situate in the parish of Redwick, in the county of Monmouth, and known as the Mead estate; that Baker had, in 1856, purchased the Mead estate, and by the conditions of sale had direct notice that the Mead estate was liable to repair and maintain the sea-bank. That at the date of the presentment the sea-bank was out of repair, and that it was absolutely necessary for the safety and defence of the level that the sea-bank should be effectually repaired with stone-pitching in front, and that the commissioners had, on the failure of the defendant to do the same, caused such repairs and works to be done at the cost stated in the presentment. That immediately after the purchase of the estate the defendant mortgaged it in fee, and the inheritance in fee simple has since continued to be vested in the mortgagee, but it was admitted by the defendant that when the presentment was made in January, 1863, he was in the actual receipt of the rents and profits of the Mead estate, from the occupying tenant.

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The defendant was not the owner or occupier of the sea-bank, nor the owner or occupier of any land on either side of or adjoining the sea-bank; the land on the inland side of the sea-bank, and adjoining it, belonged to Charles Williams, and the land on the sea side of the bank, and extending from it to the sea, is called Porton Wharf, and belongs to the Lords of Porton; but there are numerous instances within the level of persons being liable to maintain and repair ratione tenuræ, and they have maintained and repaired the defences and works within the level, although they have no land on either side of or abutting on the sea-bank. No notice had been given to the defendant by any officer of the court of sewers to put the sea-bank into good and sufficient repair, under s. 15 of 3 & 4 Wm. 4, c. 22. (1)

H. Matthews shewed cause. It is objected by the defendant that inasmuch as he has mortgaged the Mead estate, he is neither owner nor occupier, and is not liable to be charged with the repairs of the sea-bank; for this proposition, no doubt, the following passage from Callis on Sewers, p. 139, will be relied on: "The mortgagor for the title he hath by the condition to reduce the lands back again to him, or he which hath title to land by action, condition, or entry, or he which hath a contingent use, shall not be taxed for them." This passage refers clearly to the case of a mortgagor out of possession who is reduced to the condition of bringing

(1) 3 & 4 Wm. 4, c. 22, s. 15, "Nothing in this act contained shall extend or be construed to extend to release or discharge any person, body politic or corporate, from any liability to which such person, body politic or corporate, was or were before the passing of the act subject by reason of tenure, frontage, prescription, custom, covenant, or grant; but in case any such person, body politic or corporate, shall not keep in good and proper repair any walls, banks, sewers, guts, gotes, calcies, tunnels, culverts, sluices, floodgates, tumbling bags, cuts, and other works, aids, and defences, to which he, she, or they may be liable by reason of any such tenure, frontage, prescription, covenant, or grant, and shall not after having had seven days' notice from the surveyor, dikereeve, or other officer to be appointed by the court of sewers for that purpose, proceed to put the same into good and proper repair with all reasonable and proper despatch, then and in that case it shall be lawful for such surveyor, dikereeve, or other officer, to put the same into good and sufficient repair; and the expenses to be incurred shall be paid by the person, body politic or corporate liable to such repair as aforesaid."

a suit in Chancery to redeem the estate, or of a person whose entry is tolled by disseisin. A person who takes the profits of the land is taxable. Therefore, in the case of copyhold land, the copyholder is taxable, though the lord of the manor is the freeholder: "Though the freeholder is lord of the copyhold yet he is seised of the freehold thereof, but in imagination and construction of the law the copyholder is the pernor and taker of the visible and substantial profits:" Callis, p. 133. The same principle applies to the case of mortgagor and mortgagee. The mortgagee is the freeholder, but the mortgagor in possession is the pernor and taker of the profits, and he is rightly assessed. The occupier may primarily be charged on his liability to repair for the convenience of the public, but the charge must ultimately fall on the owner, and if the commissioners of sewers charge the owner of the land, though he be not in actual occupation, it is a good assessment. In *Reg.* v. *Bucknell* (1) it was held that the occupier may be charged, and in *Reg.* v. *Watson* (2) a tenant at will was held liable to repair a bridge by reason of his possession of land charged with repair; and *Baker* v. *Greenhill* (3) is a strong authority to shew that the occupier of lands charged with repair of a bridge is primarily responsible to the public for the repairs, and that he would be entitled to look for reimbursement to the owner, who ought to have repaired, and who holds the land by service of repairing. In Callis, at p. 143, the law is laid down: "It is sufficient for the commissioners to impose or lay the rate, tax, or cess on the grounds, or on the visible possessors thereof: and if the money so rated be demanded on the lessee for years or for life, or if the goods be distrained therefor, or they be compelled to pay the same, then they may come before the commissioners and shew forth their lease, and make it appear that J. S. hath the reversion, and, as the case is, to be charged as well as himself." In a note is cited this passage from March Reports, 198: "But Heath, Justice, B. R., in the case of *Commins* v. *Massam*, was of opinion that the commissioners of sewers may charge the lessor or lessee at their discretion, though it were for a new defence." In *Reg.* v. *Ramsden* (4) it was decided that the liability to repair ratione clausuræ was not

(1) 7 Mod. 55, 98.
(2) 2 Ld. Raym. 856.
(3) 3 Q. B. 148.
(4) E. B. & E. 949.

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on the owner, but on the occupier; in *Rex* v. *Sutton* (1) the point was raised whether an infant owner, who was not the occupier of lands charged with repair of a bridge, could be indicted for non-repair, but it became unnecessary to decide it, as the Court held that the guardian was both owner and occupier, and therefore liable.

The Court then called upon

Smythies (*Manisty, Q.C.*, with him), to support the rule. The chief objection to the presentment and judgment is, that it does not allege that notice was given to the defendant to do the repairs, and that he neglected to repair. The judgment of the Court of Sewers that the defendant shall pay the costs of the repairs without giving him the option of putting the bank in repair is erroneous; s. 15 of the 3 & 4 Wm. 4, c. 22, provides that in case any person shall not keep in good and proper repair any banks and other works to which he may be liable by reason of any such tenure. . . . and shall not after having had seven days' notice from the surveyor. . . for that purpose proceed to put the same in good and proper repair with all reasonable and proper despatch, then it shall be lawful for such surveyor to put the same into good and sufficient repair; and the expenses to be incurred thereby shall be paid by the person. . . . liable to such repair. The requirements of that section have not been complied with.

[*Matthews*, contrà. No doubt if these proceedings were taken under s. 15 of the 3 & 4 Wm. 4, c. 22, the provisions of that section must be followed, but this presentment is made under s. 3 of 23 Hen. 8, c. 5, and the powers conferred by this section on the commissioners are very large. After authorizing the commissioners to repair all walls and banks, and also to inquire through whose default the hurts and damages have happened, and who hath or holdeth any lands, &c., by the walls and banks, and all those persons and every of them to tax, assess, charge, distrain, and punish, after the quantity of their lands, &c., and to depute and assign bailiffs, surveyors, and expenditors, &c., and to distrain for the arrearages of every collection, tax, or assess,—the section commands them "to survey the walls. . . . banks, and accomplish, fulfill, hear and determine all and singular the premises in due form, and to the

(1) 3 A. & E. 597.

effect aforesaid, after your good discretions; and all such as ye shall find negligent, gainsaying, or rebelling in the said works, reparations, or reformations. . . . that ye do compel them by distress, fines, and amerciaments, or by other punishments . . . which shall seem most expedient for the speedy remedy, redress, and reformation of the premises, and due execution of the same." It is competent, therefore, for the commissioners to do the repairs, and to pay for the expense incurred in executing them by imposing a fine equivalent to the costs of the repairs which they have done.]

Owing to the doubts which existed as to the powers of the commissioners under the 23 Hen. 8, c. 5, and the difficulties of carrying out that statute, the statute of 3 & 4 Wm. 4, c. 22, was passed, and the latter act supersedes the former; but independently of any statute, at common law the commissioners have no power to do the repairs without first giving the defendant notice to repair.

With regard to the other point, the words of the 23 of Hen. 8, c. 5, s. 3, are, "who hath or holdeth any lands. . . . by the walls, ditches, banks, &c." The defendant neither hath nor holdeth lands, and a person who has no legal estate cannot be assessed; the defendant is neither the owner nor occupier of lands. *Reg.* v. *Watson* (1) and the other cases cited are cases of liability to repair bridges, it was not disputed that the occupiers of land are, in such cases, liable. In *Reg.* v. *Bucknell* (2), reported in Holt, 128, it was held that the terre-tenant was the proper person to be presented, and certainly that is the most convenient course to adopt, for if he be not liable to be taxed he can deduct the amount from the rent. *Baker* v. *Greenhill* (3) only decided that, for the sake of public convenience, the occupier was primarily liable. According to the cases and the statute it is difficult to see, if the occupier or the mortgagee were presented, how either of them could evade payment; but there is no authority for saying that the mortgagor is liable.

COCKBURN, C.J. I thought at first that the objection which was raised by Mr. Smythies was a very serious one, namely, that

(1) 2 Ld. Raym. 856. (2) 7 Mod. 55, 98; Holt, 128.
(3) 3 Q. B. 148.

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whereas the statute of 3 & 4 Wm. 4, gives power to the commissioners to give notice to the person bound to repair, and, upon his not repairing, empowers them to do the work, and to charge him with the expenses, the requirements of that statute had not been fulfilled, in consequence of no notice having been given to the tenant, but I think that that objection was entirely got rid of by the answer which Mr. Matthews has given to it, namely, that the commissioners were not proceeding under that statute, but under the old statute of Henry 8, which enables them to assess and impose such fine or pecuniary imposition as may be necessary under the circumstances. This judgment, therefore, is not only founded on the finding of the jury, that the defendant was the party liable by reason of tenure to do this repair, and that the wall was out of repair, but the jury go on to find that the cost of repairing it will amount to a given sum, and then the Court, acting upon that finding of the jury, assess the amount of the imposition upon the defendant at that sum, the proceeding being under the old statute.

I think there is nothing in the other point. The proceeding is against the defendant as the owner of this estate. It turns out that he has mortgaged the estate, but he is in possession, though not personally, by means of his tenant who pays a rent. That is quite enough to enable the commissioners to exercise their authority as against him. They are not bound to inquire whether the legal estate is in him, or whether he has parted with it to somebody else. They find him in possession of the estate, and he "hath or holdeth" the estate, and thereby satisfies the terms of the statute of Henry 8.

Mr. Smythies' contention is, that the proceeding ought to have been against the lessee. I am of opinion that that is not at all necessary. I do not say that the commissioners might not have proceeded against the tenant. It is possible they might, though I incline to think that where the obligation to repair arises ratione tenuræ it must be the possession of a higher estate than that of a mere tenant from year to year to make the holder liable to a presentment for non-repair; but I do not wish to be understood as deciding that question one way or the other. It is not necessary for us in this case to decide it. I think

it is enough for us to say that, whether the lessee might have been made responsible or not, the defendant, at all events, who is the mortgagor in possession of this estate, is liable, and therefore these objections fail, and we cannot take upon ourselves to quash this presentment and the judgment that has been given upon it.

MELLOR, J. I am of the same opinion. I think that the statute upon which Mr. Smythies has relied is a statute which was passed enabling the commissioners to proceed in a way different from the usual way, if they like; that is to say, if they think it essential, or necessary, or desirable, without waiting for the result of a presentment in this form, they may give seven days' notice to the party whose duty it is to repair, and if after the expiration of those seven days he does not repair, then they may proceed to do the repairs themselves, and may hold him liable for the cost of those repairs. That seems to be the effect of s. 15 of 3 & 4 Wm. 4, c. 22, but it does not take away the proceeding which existed under the old statute of Henry 8. It appears to me that the object was to give a cumulative mode of proceeding, and one rather more convenient, and certainly more expeditious, than that which they could accomplish under the old statute. It appears to me that the power given by the old statute still exists, and that the commissioners are at liberty to proceed in the same way as before the 3 & 4 Wm. 4, c. 22, was passed. I think therefore that Mr. Matthews, upon that part of the case, has completely answered the objection.

With reference to the other point, I do not think it necessary to add anything. I concur with my Lord in thinking that we cannot quash this presentment and inquisition.

SHEE, J. I have nothing to add to what has fallen from my Lord and my Brother Mellor.

Rule discharged.

Attorney for plaintiff: *B. Hunt, for Prothero & Fox, Newport.*

Attorneys for defendant: *Sharp & Ullithorne, for Simons & Plews, Merthyr Tydvil.*

1867
June 17.

THE QUEEN *v.* BROWN.

Compensation for Severance, under Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18)—*Accommodation Works, under Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 68, 69.

By the construction of a railway, part of an owner's land was taken, and several acres were severed from the rest, and all access cut off; the land was at the time the railway was constructed agricultural, but it had a prospective value for building:—

Held, that the compensation jury, valuing it as building land, might estimate the damage by severance as if all access were cut off, without any regard to the power of justices to order accommodation works under ss. 68 and 69 of the Railways Clauses Consolidation Act; as those works could only be ordered with reference to the land as then used for agricultural purposes, and would have been useless as an access to building land.

RULE calling on Michael Lewis Brown to shew cause why a certiorari should not issue, to bring up, for the purpose of quashing it, an inquisition, verdict, and judgment, taken before the sheriff of Middlesex, on the 13th of May, 1867, touching the claim to compensation made by Brown against the Midland and South Western Junction Railway Company in respect of his interest in certain lands in the parish of Willesden having been injuriously affected by the works of the company.

At the inquisition, which had been duly summoned, &c., under the 8 Vict. c. 18, it appeared that the claimant Brown was the owner of between twenty and thirty acres of land, called Greenhill Farm, at Willesden, of which about one and a half acres were taken by the company under the powers of their act of 1864 (27 & 28 Vict. c. cxc.), ten acres being severed from the rest by the line of railway and left without access. The land was at present agricultural land; but it was favourably situate for building purposes, and a scheme for building had been already on foot before the line of railway was projected. The land had been treated throughout the inquiry as more or less valuable for building purposes; and the under sheriff, inanswer to a question from the jury, told them, if they valued the land as building land, they must, for the purpose of this inquiry, treat the severed portion as deprived of all access, and assess the damage for severance accordingly. The

jury returned a verdict for 750*l.* for the land taken, and 1250*l.* for the damage by severance.

Pollock, Q.C. (*Gadsden* with him), shewed cause, and contended that the direction was right. It would be said that the jury ought to have been told that the claimant could obtain accommodation works by going before justices under ss. 68 and 69 of the Railways Clauses Consolidation Act (8 Vict. c. 20); but the only works the justices could have ordered were such as were necessary to the purpose for which the land was used at the present time, viz. agriculture: *Reg.* v. *Fisher* (1), and such works would have been utterly useless as acccommodation for building land. [He was then stopped by the Court.]

Hawkins, Q.C., in support of the rule, contended that the fact that accommodation works might be ordered by justices ought to have been taken into consideration by the jury: *Reg.* v. *Waterford and Limerick Railway Company.* (2)

COCKBURN, C.J. I am of opinion that this rule must be discharged. There is a great difference between the functions of a jury in assessing compensation and the power of magistrates to determine what accommodation works are necessary. A jury, whether the dispute be as to the value of land required to be taken by the company, or as to the compensation for damages by severance, in assessing the amount to which the landowner is entitled, have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market. That is the mode in which the land would be valued. So in respect of severance: the jury would have to consider how far that prospective value would be depreciated by severance. When, therefore, the jury come to the conclusion that the land will soon be valuable for building purposes, and that a portion of the land would, by reason of the severance, be rendered useless as building land, they ought to take this depreciation into considera-

(1) 3 B. & S. 191; 32 L. J. (M.C.) 12. (2) 2 Ir. C. L. Rep. 580.

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tion in assessing the amount of compensation. The magistrates, on the other hand, have to determine what works are necessary on account of the interruption to the use of the land,—that is, the present, and not the prospective use of it; they have to deal simply with its use at the time of the interruption; and the enactment of ss. 68 and 69 must be taken to apply to the mere present use of the land, be it agricultural or otherwise. In the present case it is contended that the parties might have gone before magistrates and obtained, at all events, accommodation works, and that that pro tanto would have reduced the depreciation. But I think the jury have rightly *not* taken that into account, and that it had nothing to do with the matter; for if the magistrates had ordered accommodation works according to the present exigencies of the land, the expense would be altogether thrown away so far as regards the future requirements of the land, and would have been useless as regards the severance the moment the land was applied to building purposes, inasmuch as what the magistrates could have ordered as proper accommodation for agricultural purposes would have been useless as a mode of access to houses. Therefore as the intervention of magistrates would have been of no avail, it appears to me that it was very properly left to the jury that, if they thought the land valuable for building purposes, practically speaking they must look upon the land severed as shut out from all access whatever.

MELLOR, J. I am of the same opinion. Before we could quash this inquisition, we must see clearly that there has been excess of jurisdiction. Taking a fair view of all that passed at the inquisition, it never was intended to shut out all regard to the power of magistrates to order accommodation works; but when once the jury came to the conclusion that the land was available for building purposes, anything the justices could do would be utterly useless, as they have no criteria but the present to guide them, and, indeed, have no power given them as to any prospective use of the land. The undersheriff could not be understood to mean anything else than what he in effect said, that if the jury were satisfied that the land was valuable for building purposes, practically the severed portion was cut off from all access.

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SHEE, J. I am of the same opinion. The claimant asked at the hands of the jury for compensation for his land, not treating it merely as applicable to grazing purposes, but as land shortly to become valuable for building. The objection to the undersheriff's direction is that the magistrates might still be called upon to give accommodation works. But surely that is not a matter which would justify us in interfering. The land being ex concessis rightly valued for building purposes, the accommodation works which the magistrates are empowered to order would neither increase nor alter the value as building land. It is quite plain that the accommodation works which justices are empowered to order under ss. 68, 69 of 8 Vict. c. 20 must relate to the present, not the future use of the land. They are such as are "necessary for the purpose of making good any *interruptions* caused by the railway to the use of the lands;" such works "are to be made forthwith," clearly referring to the present, not a possible future use of the land. Again, the kind of accommodation works meant is exemplified by "watering places" for cattle. All this clearly shews that the accommodation works meant are only those that would be necessary during the time the land continues to be used for the same purposes as those to which it is applied at the time of the severance by the railway. Therefore, when compensation is asked, on the ground that the land has a prospective value for building, it would have been useless to give any direction to the jury as to the power of justices to give accommodation works.

Rule discharged.

Attorneys for claimant: *Clayton & Sons.*
Attorneys for company: *Johnston, Farquhar, & Leech.*

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June 15.

WOODHOUSE *v.* MURRAY.

Bankrupt—Defeating and Delaying Creditors—Bill of Sale—Act of Bankruptcy—24 & 25 Vict. c. 134, *s.* 73.

Under s. 73 of 24 & 25 Vict. c. 134, if an execution for a debt exceeding 50*l.* be levied by seizure and sale of the goods of a trader debtor, he is to be deemed to have committed an act of bankruptcy; and if within fourteen days from the day of sale he is adjudged a bankrupt, the money is to be paid to the assignee under the bankruptcy. An execution was levied by seizure on the goods of a trader, and he then being insolvent, in consideration of the judgment creditor withdrawing the execution, assigned to the creditor the whole of his property, and ceased to carry on his trade. The jury having found the transaction bonâ fide:—

Held, that as the creditors at large could have interfered and taken the proceeds of the execution under s. 73, there was no sufficient equivalent for the assignment to the execution creditor, which was therefore void and an act of bankruptcy.

Trespass for breaking and entering certain land of the plaintiff, and a manufactory and mills of the plaintiff situate in Collier Street, Manchester; and seizing and taking machinery, plant, grinding-mills, engines, stoves, boilers, and other utensils and articles of trade, and depriving the plaintiff of the use thereof.

Second count, for converting the same goods.

Pleas—1, not guilty; 2, not possessed; on which issues were joined.

On the trial before Shee, J., at the Manchester spring assizes, the following facts were proved: One Patrick Proudfoot, carried on the trade of a garancine manufacturer, in Collier Street, Manchester. On the 21st of January, 1865, by a post-nuptial settlement, he settled certain household furniture on his wife and children, and covenanted to pay to the trustees of the settlement 10,000*l.* for their benefit. The trustees having declined to act, the plaintiff was on the 19th of April, 1866, appointed a trustee. He sued Proudfoot on the covenant contained in the deed, and on the 1st of May, 1866, signed judgment by default for 10,634*l.* 11*s.* 10*d.* On the 10th of May, 1866, execution was levied by seizure and sale of goods at his private residence and a portion of the judgment debt satisfied. On the 5th of June, 1866, execution for the residue was levied on the stock-in-trade, the machinery and plant at the manufactory in Collier Street. A negotiation ensued to induce the

plaintiff to withdraw the sheriff from possession, which he agreed to do if Proudfoot gave him security for the debt. On the 17th of August, 1866, by deed between Proudfoot of the one part and the plaintiff of the other part,—which recited that Proudfoot was possessed of certain land, and manufactory, and grinding-mills, and buildings, &c., situate in Collier Street, for the residue of a term of 999 years, and that in a certain action the plaintiff had recovered judgment at law against Proudfoot, and execution had followed, and certain money had been realized towards the satisfaction of the judgment, but a balance still remained due; and the plaintiff in further pursuance of the judgment, had entered into and had since retained possession of the premises, which had occasioned considerable expense in respect of possession money and poundage, in addition to various costs and expenses previously incurred, and owing under the action and for other causes, and that the balance of the judgment debt amounted to 6546*l.* 18*s.* 1*d.* and the plaintiff at the request of Proudfoot had agreed to withdraw from possession on Proudfoot executing to him a mortgage of the premises for securing that sum,—Proudfoot in consideration of the premises assigned by way of mortgage to the plaintiff the residue of the term in the works and premises in Collier Street. On the same day Proudfoot executed a bill of sale to the plaintiff which contained recitals similar to those in the mortgage deed mutatis mutandis, by which he assigned to the plaintiff, subject to a proviso for redemption on payment of the residue of the judgment debt, all the stock-in-trade, machinery and plant, in and about the works and premises in Collier Street. On the next day, the 18th of August, the sheriff withdrew from possession. The two deeds comprised the whole of the property with which Proudfoot could carry on his business, and all his effects; at the time he executed them he was in insolvent circumstances, and he then ceased to carry on his trade. On the 28th of August the plaintiff entered on the works and premises, and took possession of the property.

On the 12th of September Proudfoot was adjudged a bankrupt, and the defendant was appointed creditors' assignee. On the 19th of September the messenger of the Court of Bankruptcy took possession of the works and effects.

The jury found that the transaction between Proudfoot and the

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plaintiff was bonâ fide; a verdict of 40*s.* was entered for the plaintiff by arrangement, leave being reserved to enter a verdict for the defendant.

A rule was accordingly obtained, on the ground that the two deeds conveying all the property of the bankrupt constituted an act of bankruptcy.

E. James, Q.C., Quain, Q.C., and *R. G. Williams,* shewed cause. First, the jury have found that the transaction between the plaintiff and Proudfoot was bonâ fide; to make the transaction void the transfer must be fraudulent, and it must be executed with intent to defeat and delay creditors. The jury have negatived fraud, and the effect of the transfer is not necessarily to defeat and delay creditors. The bankrupt was left in possession of the machinery and goods. He might have obtained credit and carried on his business so as to pay all his creditors.

[COCKBURN, C.J. It was long ago decided in *Siebert* v. *Spooner* (1) that an assignment of the whole of the property of a trader is an act of bankruptcy without actual fraud.]

Secondly, the general rule is, that an assignment by a trader of the whole of his property is an act of bankruptcy; but if the debtor gets a substantial benefit in money, or in any other way, it forms an exception to the rule. All the cases where an assignment of his property by a debtor has been deemed fraudulent, and an act of bankruptcy, are cases where the assignment was made without consideration, or for a bygone and before-contracted debt: Smith's Mercantile Law, 7th ed. 583. In *Bittlestone* v. *Cooke* (2) Crompton, J. says: "The old cases clearly established the rule that a conveyance of the trader's property, leaving it no longer in his option whether he would continue his trade, was in law an act of bankruptcy, as necessarily defeating his creditors. On this an exception has been engrafted that the conveyance is not an act of bankruptcy, if it be for an equivalent." The transfer in the present case is valid, because the debtor gets an equivalent. The advantages which the debtor gets by executing the assignment are, the benefit of the withdrawal of the execution. By this he saves his goods from an immediate sale, and avoids committing an act

(1) 1 M. & W. 714. (2) 6 E. & B. at p. 311; 25 L. J. (Q.B.) at p. 289.

of bankruptcy under s. 73 of the Bankruptcy Act, 1861 (1); he remains in possession of his works and goods, and his credit is not destroyed. It may be that the withdrawal of the execution is a greater advantage to the debtor and his estate than an advance of money. The assignment was given to relieve the estate from the charges on it, and is such a benefit as will make the transfer valid: *Whitmore* v. *Claridge*. (2)

[COCKBURN, C.J. The difficulty arises under s. 73 (1); by that section the seizure by the sheriff is an inchoate act of bankruptcy. If a sale had taken place under the execution, the debtor might have been adjudged a bankrupt, and then his property could have been distributed rateably among all his creditors. By withdrawing the sheriff, and taking the assignment, the plaintiff gets everything, and the other creditors nothing. The effect of the assignment under these circumstances is therefore to defeat and delay creditors.]

It does not follow, if the execution had been levied by seizure and sale, that the creditors would necessarily have interfered. Proudfoot may, or may not, have been made a bankrupt.

S. Temple, Q.C., and *John Edwards*, were not called upon to support the rule.

COCKBURN, C.J. I think that this rule should be made absolute. It is well established law that the assignment of the whole of the estate and effects of a trader is void, and constitutes an act of bankruptcy, because it is contrary to the policy of the bankrupt law; and this is based upon the principle that where a man is in

(1) 24 & 25 Vict. c. 134, s. 73: "If any execution shall be levied by seizure and sale of any of the goods and chattels of any trader debtor, upon any judgment recovered in any action personal, for the recovery of any debt or money demand exceeding 50*l.*, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels; and unless in the meantime a petition for adjudication of bankruptcy against the debtor be presented, the sheriff shall proceed with the execution, and shall, at the end of seven days after the sale, pay over the proceeds to the execution creditor, who shall be entitled thereto, notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy."

(2) 33 L. J. (Q.B.) 87.

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insolvent circumstances his property must be divided pro ratâ among the body of his creditors. Therefore, if a man in insolvent circumstances make over the whole of his effects to another, he prevents himself from carrying on his business, or paying his creditors, or distributing his property among them in the proportion of their several claims. It is an act of bankruptcy under the old acts of 6 Geo. 4, c. 16, the 12 & 13 Vict. c. 106, and the more recent act of 24 & 25 Vict. c. 134: the language in all is the same; and it has been held to make a deed which conveys the whole of a trader's effects with intent to defeat and delay creditors an act of bankruptcy. The construction put upon the language of each of these statutes is the same. The words of Parke, B., in *Sierbert* v. *Spooner* (1) are: "I take it to be perfectly well settled, that where a trader makes an assignment of all his effects, or of all except a very small portion, it is necessarily an act of bankruptcy without any actual fraud." He then refers to several cases which it is unnecessary for me to go over; and it was decided that an assignment by a trader of all his effects to a creditor was an act of bankruptcy. Yet the statute speaks of a fraudulent conveyance with intent to defeat and delay creditors. The meaning of the learned judge, and the principle upon which the cases have been decided is, that though there may be an absence of fraud in fact, that is, intentional fraud, yet when the effect of such a conveyance is to put it entirely out of a man's power to go on with his business, and to meet his creditors, there he must be taken to have intended the consequence of what he has done, and, though not guilty of intentional fraud, or, as we call it, moral fraud, yet he is guilty of fraud against the policy of the bankrupt law, which is that there should be an equal distribution among all the creditors.

On this, one exception has been engrafted: it is, where the trader, in disposing of his effects, gets something which to him and his creditors is an equivalent; and *Bittlestone* v. *Cooke* (2) shews that an equivalent need not be an actual equivalent in point of value. It may be that the trader gets less than the value of the property he parts with. It may be that under the pressure of some extraordinary exigencies, the trader, with an

(1) 1 M. & W. at p. 718. (2) 6 E. & B. 296; 25 L. J. (Q.B.) 281.

honest object of saving himself from bankruptcy and ruin, with a view to his own benefit and that of his creditors, and with an honest and bonâ fide desire to carry on his trade, pledges his effects, even the whole of them, to realize a sum of money which may fall very far short of their value, yet, looking at all the circumstances, it is so plain the intention was an honest one, not to get a sum of money to put into his pocket, but in order to carry on his business, that such an assignment of all his effects would not be considered an act of bankruptcy. There must, however, be an equivalent in the transaction, or it would be void as being contrary to the policy of the bankrupt law, and amount to an act of bankruptcy. Lord Campbell, in *Bittlestone* v. *Cooke* (1), says: "I agree that a conveyance of this sort of all a trader's effects is invalid, unless there is an equivalent; but I cannot say the advantage obtained for the trader and the creditors by these advances was not a full equivalent for the pledge." He points out that in times of pressure an advance of ready money of a very small amount may very often prevent a trader from stopping payment, and enable him to pay all his creditors 20*s.* in the pound. It is clear that Lord Campbell considers the equivalent, which he is referring to as necessary to give validity to the transaction, as an equivalent which is to be obtained as an advantage accruing, not only to the trader, but also to the creditors. It is said here that there is an equivalent, because the sheriff being in possession, and being about to sell and satisfy the execution, the creditor agreed with the debtor that, instead of the sheriff selling, the debtor should, on the execution being withdrawn, make a bill of sale, whereby he should assign all his property to the creditor, the present plaintiff,—and we must take it as a fact, proved at the trial, that the property in question comprehends all the estate and effects of the insolvent trader, Proudfoot. I concur with the learned counsel for the plaintiff, that if the law had stood as it did before the passing of the 24 & 25 Vict. c. 134, s. 73, there was an equivalent for an assignment of his property by the execution debtor. The position of the creditors would have been exactly the same, because the plaintiff having got judgment and issued execution, and the sheriff having seized all the property of the trader to satisfy the exigency

(1) 6 E. & B. at p. 308; 25 L. J. (Q.B.) at p. 288.

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of the writ, the property to all intents and purposes was taken possession of in such a way as that the other creditors could not get possession of it; therefore it would be immaterial to them whether the property was sold by the sheriff to satisfy the execution creditor, or by an arrangement between the execution debtor and the execution creditor, was by a bill of sale transferred to the creditor. So far as the other creditors are concerned, the effect would have been the same. But s. 73 of 24 & 25 Vict. c. 134 appears to me to make a material alteration in the position of the parties. It does so, inasmuch as it is no longer indifferent to the creditors whether the goods are handed over to the execution creditor by virtue of an arrangement between the execution debtor and himself, or sold by the sheriff to satisfy the writ of execution, as in the one case the creditors have no opportunity of getting the proceeds, in the other they have. The creditors, by making the execution debtor a bankrupt within fourteen days, under s. 73, might secure to themselves the proceeds of the sale; and I cannot take it for granted that the other creditors would not have taken advantage of the statute and made Proudfoot a bankrupt. I must assume that when the law gives creditors an opportunity of obtaining payment by a certain process, they would have recourse to it. It seems to me impossible to say that the creditors have not been seriously damnified by the course pursued, and consequently it would be wrong to say that they have anything in the shape of an equivalent for the bill of sale given by the execution debtor.

I do not say that an equivalent must necessarily be of money's worth. If it could have been shewn in the present case that the circumstances of the bankrupt were such as that by his being left in the temporary possession of the effects, he would have been enabled to carry on his business, or could so have found capital to go on with, and if the arrangement between the parties had been entered into for the purpose of enabling the bankrupt to go on with his business and pay his creditors, there might have been an equivalent to the creditors which would have given validity to the transaction; but the facts are, that the bankrupt, so far as money was concerned, was in a perfectly helpless condition, and his affairs were in a hopeless state of insolvency. I do not find that the facts of this case bring it within the exception to the general rule,

that where a trader gets rid of his estate so as to incapacitate him from carrying on his business, that it is an act of bankruptcy. I must therefore hold the transaction as voidable. The rule granted on the assumption that the transaction was illegal and an act of bankruptcy must be made absolute.

MELLOR, J. I am of the same opinion. I shall only add a few words to the judgment of the Lord Chief Justice. The facts of case bring it clearly within the rule laid down in *Stewart* v. *Moody* (1) and *Smith* v. *Cannan*. (2) The test, whether the deed is an act of bankruptcy, is, does it necessarily delay the creditors of the trader? It must be shewn that although the right of property is changed under the assignment, yet the position of the trader is substantially unchanged, and that he gets by the transaction an equivalent either in money which may enable him to carry on his trade, or in a supply of articles, or in some other way. Primâ facie, as soon as Proudfoot conveyed all his property to the plaintiff under the bill of sale, he committed an act of bankruptcy, and it is for the plaintiff to shew that the transaction was valid and an exception to the general rule. I am of opinion that he has not shewn that the debtor received an equivalent for the assignment. The jury have found that the transaction was bonâ fide, that is to say, it was not fraudulent in the sense of its being a concocted scheme; but it is a fraud within the bankruptcy laws. If the levy by the sheriff had been completed under s. 73, the estate might have been distributed amongst all the creditors, and the bill of sale necessarily defeated that result. I think the deed is void, and the rule ought to be made absolute.

SHEE, J. I agree with the other members of the Court that the rule should be made absolute. I think that even before the passing of the 24 & 25 Vict. c. 134, the assignment would have constituted an act of bankruptcy, because Proudfoot being in insolvent circumstances conveyed the whole of his property so as to preclude the possibility of his carrying on his trade and paying his creditors, and the effect of the deed must necessarily be to defeat and delay creditors. But since the passing of that act it seems to

(1) 1 C. M. & R. 777. (2) 2 E. & B. 35; 22 L. J. (Q.B.) 290.

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me to be quite clear that the effect of the assignment in the present case would be to defeat and delay creditors, and the parties must have known that it would have that effect: because if the sheriff had sold under the writ, and if within fourteen days from the day of sale the trader had been adjudged a bankrupt, the proceeds would have been paid to the assignees under the bankruptcy. The effect therefore of the assignment of all Proudfoot's effects under the circumstances would be to defeat the creditors, and for that reason it is fraudulent under the Bankruptcy Act and void as against them.

Rule absolute.

Attorneys for plaintiff: *Merriman & Pike.*
Attorneys for defendant: *Reed, Phelps, & Sidgwick.*

June 26.

HOBSON AND ANOTHER *v.* THELLUSON.

Sheriff, action against, for not levying—Proof of Damage—Conveyance of Goods, when it passes Property—Mercantile Law Amendment Act, 1856 (19 & 20 *Vict. c.* 97), *s.* 1—*Delivery of Writ when binding on Assignee of Goods—Knowledge of Assignor, Knowledge of Assignee.*

An action cannot be maintained against a sheriff for negligence in not levying under a fi. fa. without shewing actual pecuniary damage; and although primâ facie the measure of damage is the value of the goods which might have been and were not levied, yet it is for the jury to say, looking at the probabilities of the case, whether or not, if the execution had been levied, the plaintiff would have derived any benefit from it, by reason of the other creditors of the execution debtor being in a position to make him bankrupt.

A conveyance by a debtor of his goods to two creditors for the benefit of themselves and the other creditors passes the property at once, on the execution of the deed by the debtor, without any assent on the part of the trustees; but the knowledge of the debtor, at the time of making the deed, that a writ of execution is out against his goods, must be taken to be the knowledge of the trustees within the proviso of s. 1 of the Mercantile Law Amendment Act, 1856; and consequently the trustees' title is not protected by that section, and the goods are bound by the delivery of the writ to the sheriff.

DECLARATION against the defendant as sheriff of Yorkshire for not duly executing a writ of fi. fa. at the suit of the plaintiffs against the goods of John Bower, and for falsely returning that

Bower had no goods in the defendant's bailiwick whereon the defendant could levy.

Pleas:—1, not guilty; 2, that there were not at the time, or after the delivery of the writ, any goods of Bower in the defendant's bailiwick whereon the defendant could have levied; 3, that the plaintiffs sustained no damage by reason of the matters alleged in the declaration.

Issue joined.

At the trial before Montague Smith, J., at the spring assizes at Leeds, it appeared that the plaintiffs obtained judgment for 284*l.* against John Bower, a cloth merchant at Huddersfield, and a trader within the bankruptcy laws; and a writ of fi. fa. was issued and lodged in London with the undersheriff for Yorkshire on the 23rd of May, 1866; and a warrant was sent down to Mr. Thornton, an officer of the sheriff at Huddersfield, by the evening post of that day, and was delivered at his office there at half past seven in the morning of the 24th of May. Jaggar, the assistant to Mr. Thornton, went to the office about a quarter past nine. Jaggar opened the warrants, and on coming to the warrant against Bower's goods, which he had reason the day before to expect, he at once sent off one Sizer to watch Bower's warehouse, which was 400 or 500 yards off; and on Mr. Thornton coming in about five minutes afterwards Jaggar went off himself to the warehouse with the warrant. He got to the warehouse at twenty-five minutes past nine, and found the outer door fastened with two locks. Sizer was left, and remained on the watch till just before ten o'clock, when he withdrew in consequence of a message from Thornton, the door being still locked. Bower, it appeared, had had notice of the writ, and had had the warehouse kept closed in consequence; and he went to the office of Mr. Learoyd, his attorney, on the morning of the 24th of May, and told him that an execution was out against his, Bower's, goods; and at Mr. Learoyd's suggestion a deed of assignment was drawn up, in form schedule D. to the Bankruptcy Act, 1861, and executed by Bower at a few minutes before ten, by which Bower conveyed all his goods to Robert Wood and Thomas Hirst, two of his creditors, to be applied for the benefit of themselves and all the other creditors. Thornton, the sheriff's officer, was at once informed of the deed, and took

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possession of the goods in the warehouse by Learoyd's direction on behalf of the trustees under the deed. Learoyd was not at this time employed by the trustees, but he became their attorney soon afterwards. Neither of the trustees assented to the deed at the time of execution, but Wood executed it on the afternoon of the 24th of May, and Hirst a few days afterwards. A meeting of Bower's creditors was held on the 4th of June as to what was the best course to pursue, and most of the requisite assents to the deed were given on that day, but the plaintiffs refused theirs; and it was determined that no preference of any kind should be allowed to any creditor, and bankruptcy was suggested as the alternative if some arrangement was not come to. Meetings were again held on the 12th and 19th of June, and on the last occasion the plaintiffs agreed to suspend their proceedings, and it was determined to wind up under the deed; and the requisite assents having been obtained, the deed was registered on the 21st of June.

The learned judge told the jury that a sheriff's officer might break open the door of a warehouse, but was not bound in law to do so at once; and he left it to them to say whether the sheriff had used due diligence in executing the warrant, that is, could the officer, with due diligence, have made the levy before ten o'clock? If they thought the officer ought to have broken the locks at once they would find for the plaintiffs, otherwise for the defendant.

The jury found for the defendant, leave being reserved to move to enter a verdict for the plaintiffs for such sum (if any) as the Court should think them entitled to, the Court to have power to draw any inference of fact not inconsistent with the finding of the jury as to the breaking of the locks.

A rule was obtained to enter the verdict for the amount of the judgment, or for the costs of action and execution, or for nominal damages.

Field, Q.C., and *Wills*, shewed cause. The writ was delivered to the sheriff on the evening of the 23rd of May, and the jury have found in favour of the defendant that there was no laches on his part up to ten o'clock on the morning of the 24th, when the deed was executed by Bower, and the warehouse opened and possession taken on behalf of the trustees. No leave was reserved on this

point, and it is not now open to the plaintiffs; but it is clear that, although a sheriff may break open a warehouse to levy an execution, yet, as matter of law, he is not bound to do so at once. At ten o'clock, before the sheriff was in default, the deed was executed which, but for the delivery of the writ to the sheriff, passed the property from Bower to the trustees.

[BLACKBURN, J. Is that so? When did the deed cease to be voluntary?]

The trustees both took beneficially, being creditors, and the conveyance was to them for the benefit of themselves and the other creditors; and *Siggers* v. *Evans* (1) is directly in point, that the property passed immediately on execution by the assignor.

[BLACKBURN, J. That is a considered judgment, and very much in point.]

Then by the Mercantile Law Amendment Act of 1856, 19 & 20 Vict. c. 97, s. 1 (2), the delivery of the writ is not to affect the title acquired bonâ fide before actual levy without notice; and there was no notice to the trustees here. But assuming these points against the defendant, and that the sheriff ought to have levied on the warehouse being opened notwithstanding the deed, the action cannot be maintained unless damage be shewn, and the Court are to draw inferences of fact. Now by s. 73 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), Bower being a trader, the execution being for above 50*l.* would have been in itself an act of bankruptcy, and if followed by adjudication within fourteen days of the sale the execution creditors could not have retained the proceeds of their execution. And moreover, by s. 74 the sale must be by auction, and not till after three days public advertising; so that had the execution been insisted on, it is clear that Bower would have been made a bankrupt, and the

(1) 24 L. J. (Q.B.) 305; 5 E. & B. 367.

(2) 19 & 20 Vict. c. 97, s. 1: "No writ of fieri facias or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person bonâ fide and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, undersheriff, or coroner."

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plaintiffs would have got nothing, and therefore they have lost nothing by the supposed laches of the defendant. Or again, the deed might have been registered under s. 192; and then by s. 198 the sheriff must have withdrawn: *Rogers* v. *Roberts*. (1) Section 184 also of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106) would have prevented the plaintiffs getting more than their rateable share under their execution.

Manisty, Q.C., and *Kemplay*, in support of the rule. The writ having been delivered to the sheriff on the 23rd of May, the property was bound by it from that time, unless the Mercantile Law Amendment Act, 1856, prevents that consequence; and the sheriff could and ought to have levied, and sold the goods. In order to bring the trustees' title under the deed within the protection of the Mercantile Law Amendment Act, the title must be acquired bonâ fide for a valuable consideration, and without notice of the writ. Now it may be observed that the principle recognised in *Harland* v. *Binks* (2) seems scarcely reconcileable with *Siggers* v. *Evans* (3); but assuming the latter case to be law, the principle, that the assignor can confer a good title without assent on the part of the trustee, where he is also beneficially interested, must be carried to its legitimate conclusion, and then it must follow that the knowledge of Bower and his attorney was the knowledge of the trustees; they cannot take without knowledge on the part of Bower. Notwithstanding the Mercantile Law Amendment Act, therefore, the goods were bound by the delivery of the writ, and the sheriff was in default for not levying after ten o'clock.

Then, as to damages; it certainly cannot be argued from subsequent events that the deed would have been registered in time to supersede the execution. Again, as to the three days notice before sale, required by s. 74, that would have had no effect; it was not till the 4th of June that the first meeting of creditors was held, and it is not competent to a jury to speculate in this manner on what would be likely to happen under given circumstances. At all events, under s. 73 the plaintiffs would have been entitled to their costs of action and execution.

[BLACKBURN, J. The deed conveyed all the trader's goods

(1) Law Rep. 2 Ex. 35. (2) 15 Q. B. 713; 20 L. J. (Q.B.) 126.
(3) 5 E. & B. 367; 24 L. J. (Q.B.) 305.

and was therefore an act of bankruptcy; would not s. 133 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), apply, if notice of this act of bankruptcy had been given before the sale?]

The deed cannot be given in evidence without being registered.

[BLACKBURN, J. There are two cases before Lord Westbury to the contrary: *Ex parte Morgan* (1) and *Ex parte Wensley.* (2)]

There was here only notice to the sheriff's officer, which is not sufficient; notice must be brought home to the execution creditor: *Ramsey* v. *Eaton.* (3)

[BLACKBURN, J. There would have been plenty of time and opportunity to have given notice to the plaintiffs.]

All that is mere speculation; but there was a clear breach of duty in not levying on the 24th of May; and *Clifton* v. *Hooper* (4) is a direct authority that the plaintiffs are entitled at all events to nominal damages.

[*Field, Q.C.*, observed that *Clifton* v. *Hooper* (4) was the case of an escape on a ca. sa.; and is treated as an exception to the general rule, that no action will lie against the sheriff unless actual damage be shewn: see Bullen and Leake's Pleading, 2nd ed. pp. 341, 346.]

BLACKBURN, J. This is an action against the sheriff for not levying under a writ of fi. fa., and making a false return of nulla bona. The first question is, was there any breach of duty on the part of the defendant in not seizing the goods when he might and ought to have seized them? Secondly, if there was such a breach of duty, whether the plaintiffs have sustained any damage. And thirdly, if no damage, whether the plaintiffs are entitled to a verdict for nominal damages. The facts are, that the writ of fi. fa. was lodged on the 23rd of May with the sheriff's deputy in London, and if the law stood as it was independently of the Mercantile Law Amendment Act, 1856, the delivery of the writ to the sheriff would have bound the goods of the execution debtor, and the sheriff must have seized the goods, without any regard to what might have occurred after the delivery of the writ. The

(1) 1 De G. J. & S. 288; 32 L. J. (Bank.) 15.

(2) 1 De G. J. & S. 273; 32 L. J. (Bank.) 23.

(3) 10 M. & W. 22.

(4) 6 Q. B. 468; 14 L. J. (Q.B.) 1.

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writ went down to Huddersfield by the same evening's post, and was delivered at the office of the sheriff's officer on the morning of the 24th, and the officer might have seized the goods a few minutes after nine, as they were at that time still Bower's goods; but I think the officer was not bound to go to the office earlier than he did; and that he proceeded with due diligence; and that he was not bound to break open the door of the warehouse at once without further inquiry, in the absence of any direction from the execution creditor to proceed with the utmost despatch. At ten o'clock, or a little before, Bower executed the deed of assignment; and the first question that arises is, was this delay from a quarter or five and twenty minutes past nine to ten o'clock an act of negligence on the part of the sheriff's officer? I cannot say it was, as matter of law, and the jury have found that it was not negligence, and the finding would, I think, have been fully justified by the facts, if it had been questioned. Then comes the question whether the effect of the execution of the deed by Bower was such as to make the goods cease at once to be the goods of the execution debtor, so as to be no longer seizable under the writ. I at first thought, till the case of *Siggers* v. *Evans* (1) was brought to our notice, that the deed remained a revocable and voluntary deed, and inoperative to pass the property, until election by the trustee to take under it; and that even where the trustee is one of the cestui que trust, assent by him to take must be shewn. But *Siggers* v. *Evans* (1) decided that under circumstances like the present the deed was a good conveyance to the trustee passing the property at once on the execution by the debtor, though the assent of the trustee was not given till afterwards. That was a distinct decision, undistinguishable from the present case on this point; for there, as here, the trustees were creditors, and the assignment was for the benefit of the trustees themselves, as well as the other creditors. Then comes the question which arises under the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1. Under that act, no writ of execution is to prejudice the title to goods acquired by any person bonâ fide before actual seizure and without notice to such person of the writ. Was the conveyance to the trustees in the present case

(1) 5 E. & B. 367; 24 L. J. (Q.B.) 305.

bonâ fide and without notice to them? That case of *Siggers* v. *Evans* (1) decided that the mere execution by the assignor passed the property, unless the trustee dissented, and in the present case there was full notice of the writ, both on the part of the execution debtor and his attorney who prepared the deed, and I think this must be held to be notice to the trustees themselves. The case proceeds on an artificial doctrine, and when once it is established that the act of the assignor passes the property, until the trustee disclaims, then I think that it must follow from the fact that the one can, by his own act, confer title on the other, that notice on the part of the one is notice on the part of the other. To hold otherwise would be to enable a debtor with notice always to elude the proviso of the act by fixing on a trustee who had no notice, possibly on one who could not receive notice. Mr. Manisty has, therefore, succeeded in establishing, notwithstanding the case of *Siggers* v. *Evans* (1), or rather by following out the principle of that case, that there was notice within the proviso of the act, and that the goods were bound by the delivery of the writ to the sheriff; and that, therefore, notwithstanding the execution of the deed, the sheriff might and ought to have levied on the goods during any part of the 24th of May.

Next comes the question, what damage have the plaintiffs sustained? Primâ facie, the damage is measured by the whole value of the goods which might have been seized. But at ten o'clock, before the sheriff might and ought to have levied, Bower executed the deed of assignment of all his goods, and this was for the very purpose of defeating and delaying the execution creditors, and it was therefore an act of bankruptcy. It was argued that the deed could not have been used in evidence as it would not have been registered, but *Ex parte Morgan* (2) and *Ex parte Wensley* (3) shew that though the deed could not be and was not registered under s. 192 of the Bankruptcy Act, 1861, it might be registered under s. 194, and might be set up as an act of bankruptcy. Therefore, at ten in the morning of the 24th of May, before the sheriff was

(1) 5 E. & B. 367; 24 L. J. (Q.B.) 305.
(2) 1 De G. J. & S. 288; 32 L. J. (Bank.) 15.
(3) 1 De G. J. &. S. 273; 32 L. J. (Bank.) 23.

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in default, that had happened which would have been available as an act of bankruptcy and if the officer had proceeded afterwards to levy, instead of taking possession under the deed, by s. 74 of the Bankruptcy Act, 1861, he could not have sold till after three days, and then only by public auction; so that I cannot doubt, when drawing inferences of fact, that if the sheriff had proceeded with the execution and had levied and had then advertized the sale, as he was bound to do under s. 74, the very first thing that would have happened would have been that the execution would have been brought to the notice of the trustees, or some other of the creditors, and they would infallibly have made the present plaintiffs and their attorney fully aware of the deed, setting it up in all probability, as in fact they did, as a valid transfer. What, then, would have been the consequence of this state of facts? Why, that by s. 133 of the Bankruptcy Act of 1849 the plaintiffs would have got no benefit at all from their execution; for if they had proceeded with it there would have been an adjudication of bankruptcy, and then there would have been execution levied, but not completed by sale until after notice of the previous act of bankruptcy.

Mr. Manisty says that these probable facts ought not to be taken into consideration, and that we ought not to speculate on probabilities, or whether or not the creditors would have made Bower a bankrupt. If that position were followed out to its consequences, the damages would in every case be the value of the goods which ought to have been seized. But if you may take any facts into consideration which go to shew that the execution creditor would not have reaped the full advantage of his execution, I do not see why you may not take all the facts that would probably occur as against the execution creditor's primâ facie presumption that the damages are the full value of the goods. It appears to me, as a juryman, an absolute certainty that notice of the act of bankruptcy would have been brought home to the plaintiffs before sale; and balancing the weight of probabilities, I think there is the strongest probability that had the defendant levied there would have been an adjudication of bankruptcy; and I accordingly draw the inference that the plaintiffs would have derived no benefit from their execution had it been proceeded

with. Consequently they have suffered no damage from the defendant's breach of duty.

The question remains, are they entitled to a verdict for nominal damages? I think not. The one case is anomalous and exceptional, that a creditor may maintain an action for nominal damages for an escape on a ca. sa., although the custody of the debtor would have been of no value to him, and the ground seems to be that the creditor has a right to have the body of his debtor. Whether the reasoning is satisfactory or not, it has no application to the case of not levying on goods. On the whole, therefore, it appears to me that the verdict for the defendant must stand, and the rule be discharged.

MELLOR, J. I am of the same opinion as my Brother Blackburn; and I do not intend elaborately to deal with the case as he has done. It appears to me Mr. Manisty effectually disposed of the point arising under the Mercantile Law Amendment Act, which prevents the title under an assignment of goods being affected by the delivery of a writ of execution to the sheriff, provided the person when he acquired the title had no notice of the writ. But applying that to the facts of the present case, the very argument which shews that the case falls within the principle of *Siggers* v. *Evans* (1) shews that notice to the person who is capable by himself of conferring the title must be taken to be notice to the person on whom it is conferred; to hold otherwise would be dangerous, as it would enable a debtor always to defeat an execution. The sheriff was therefore in default in not seizing the goods under the writ, after the execution of the deed: but not before, as I do not think the officer is required at once to break open a warehouse which he finds fastened. As, however, there was notice of the writ before the execution of the deed, the sheriff was in default in not disregarding the deed and levying on the goods when the warehouse was opened at ten o'clock; but then the deed was an act of bankruptcy and could have been given in evidence to support an adjudication, as was held in the cases before Lord Westbury; and the only question is the amount of damages. I cannot believe that the creditors would have stayed their hands and not made Bower a

(1) 5 E. & B. 367; 24 L. J. (Q.B.) 305.

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bankrupt had the plaintiffs persisted in their course, and then there would have been no benefit resulting to the plaintiffs as execution creditors. Possibly, it was argued, the jury might have said the plaintiffs would have got their costs under s. 73 of the Bankruptcy Act of 1861; but that would not be so; and as a juryman I cannot come to any other conclusion than that the plaintiffs have suffered no damage; and the verdict for the defendant must therefore stand.

Rule discharged.

Attorneys for plaintiffs: *Gregory, Rowcliffes, & Rawle, for Kidd, Jessop, & Armitage, Holmfirth.*

Attorneys for defendant: *Bell & Brodrick, for T. W. Clough, Huddersfield.*

June 27.

HODGES *v.* COBB AND ANOTHER.

*Evidence—Witness, Commission to Examine—Variance between Judge's Order and Commission—*1 *Wm.* 4, *c.* 22, *ss.* 4, 10.

A judge's order, under 1 Wm. 4, c. 22, s. 4, ordering a commission to issue for the examination of witnesses abroad, contained a clause that "the depositions of every witness be signed by him and the commissioner." The writ of commission contained no such clause. The commission was duly executed, and the depositions returned without the signature of the witnesses:—

Held, that the clause in the order was merely directory, and that a non-compliance with it did not render the depositions inadmissible in evidence under s. 10 against the defendant who had refused to join in the commission.

EJECTMENT to recover lands in the county of Sussex.

On the trial before Bramwell, B., at the Sussex spring assizes, it appeared that the plaintiff claimed title through one Sarah Hodges, who died at Adelaide, in South Australia; and to prove her death, the plaintiff tendered in evidence certain depositions taken under a commission to examine witnesses in Australia, issued by virtue of 1 Wm. 4, c. 22 (1), at the instance of the

(1) 1 Wm. 4. c. 22, s. 4: "It shall be lawful to and for each of the said Courts of Westminster, and also the Court of Common Pleas of the County Palatine of Lancaster, and the Court of Pleas of the County Palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of

plaintiff, and in which the defendants refused to join. The judge's order for the commission contained the following clause: "and I do further order that the depositions of every such witness be signed by him and by the commissioner." The writ of commission contained no such clause. The commission was duly executed, and the depositions taken under it returned under the hand and seal of the commissioner, without having been signed by the witnesses.

It was objected, on the part of the defendants, that the depositions not having been signed by the witnesses according to the judge's order, were not admissible in evidence.

The learned judge received the depositions, and a verdict was entered for the plaintiff, with leave to the defendants to move.

A rule was obtained accordingly to enter a nonsuit or verdict for the defendants, on the ground that the depositions were inadmissible, not being signed by the witnesses, and that there was no evidence of the death of Sarah Hodges.

Robinson, Serjt., and *Watkin Williams*, shewed cause, and cited *Grill* v. *General Colliery Company*. (1)

Sir G. Honyman, Q.C., supported the rule, and cited *Clay* v. *Stephenson* (2); *Greville* v. *Stultz*. (3)

[BLACKBURN, J., referred to *Hawkins* v. *Baldwin*. (4)]

BLACKBURN, J. The power to issue the commission is conferred by the 1 Wm. 4, c. 22, s. 4, and the judge may "give all such directions touching the time, place, and manner of the examination of witnesses, and all other matters and circumstances connected

the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the Court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just."

(1) Law Rep. 1 C. P. 600. 12 Jur. N.S. 727

(2) 7 Ad. & E. 185.

(3) 11 Q. B. 997.

(4) 20 L. J. (Q.B.) 198; 16 Q. B. 375.

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with such examinations as may appear reasonable and just;" and s. 10 provides that the depositions certified under the hand of the commissioners shall be read and received in evidence at the trial. In this order the judge has directed that the depositions shall be subscribed by the witnesses. The depositions under the commission have been returned without their signature. Is the direction of the judge in the order, that the depositions shall be subscribed by the witnesses, a condition precedent to their admissibility as evidence at the trial? I think, that in this respect the order is merely directory, and a non-compliance with it is not fatal to their reception. The commission appears to me executed in conformity with the statute "as to the time, place, and manner of examination," and that is all the statute requires. If the defendants had been in any way prejudiced by the depositions not having been signed, that might be a ground for an application to the equitable jurisdiction of the Court to set aside the commission. The depositions are admissible, although on a proper application prior to the trial they might have been set aside.

MELLOR, J., concurred.

Rule discharged.

Attorneys for plaintiff: *Coode, Kingdon, & Cotton.*
Attorney for defendants: *T. M. Cattlin.*

END OF TRINITY TERM.

REGULA GENERALIS

AS TO PROCEEDINGS ON APPEALS.

TRINITY TERM, 1867.

General Rule of all the Courts.

It is Ordered that on Appeal from one of the Superior Courts, such Court shall have power to allow interest for such time as Execution has been delayed by the proceedings in Appeal for the delaying thereof; and the Master, on taxing the costs, may compute such interest without any rule of Court, or Order of a Judge for that purpose.

And be it Ordered that in lieu of the form No. 21 in the Rule of Michaelmas Vacation, 1854, the following may be the form of a Judgment of Court of Appeal in Exchequer Chamber on a disposal of the Appeal in the Plaintiff's favour where Judgment for him had been given in the Court below, under the 41st and 42nd sections of the Common Law Procedure Act, 1854 [*Copy the Case for the Appeal as stated by the Parties, and then proceed thus:*—] Afterwards on [*the day of giving Judgment of Court of Appeal*] in the Court of Exchequer Chamber of our Lady the Queen, before the Justices of the Common Bench of our Lady the Queen, and the Barons of her Exchequer [*or, if the Appeal be from the Common Pleas, say:*—"before the Justices of our Lady the Queen, assigned to hold Pleas in the Court of our Lady the Queen, before the Queen herself, and the Barons of her Exchequer," *or, if the Appeal be from the Exchequer, say:*—"before the Justices of our Lady the Queen

assigned to hold Pleas in the Court of Our Lady the Queen before the Queen herself, and the Justices of the Common Bench of our said Lady the Queen"], come the parties aforesaid by their respective Attorneys aforesaid; and the said Court of Appeal decide that, &c. [*State the decision of the Court upon the questions raised by the Case on Appeal*]: And it is considered by the said Court of Appeal that the Plaintiff do recover against the Defendant £ for his damages and his costs which the Plaintiff hath sustained and expended by reason of the delay of Execution on pretence of the proceedings in the said Appeal, and that the Plaintiff have Execution thereof.

(Signed) A. E. Cockburn.
Wm. Bovill.
Fitzroy Kelly.
Samuel Martin.
J. S. Willes.
G. Bramwell.
W. F. Channell.
J. Barnard Byles.
Colin Blackburn.
H. S. Keating.
Jno. Mellor.
Willm. Shee.
Montague Smith.
Robt. Lush.

6th June, 1867

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ACTION FOR REWARD—*Information "leading to" Apprehension of Offenders—Remoteness of Cause.*] The defendant's shop having been broken into, and watches and jewellery stolen, the defendant advertised, along with a description of the stolen property, "a reward will be given to any person who will give such information as shall lead to the apprehension and conviction of the thieves." In about a week R. brought one of the stolen watches to the plaintiff's shop, the plaintiff gave information, and R. was arrested at the plaintiff's shop with another of the stolen watches upon him. After two or three days R., being in custody, told the police that the thieves would be found at a certain shop, and they were apprehended there a week afterwards, and subsequently convicted, R. being convicted as receiver. The plaintiff having brought an action for the reward, at the trial the above facts were proved; but the police officers swore that the information given by R. was not the means of the thieves being apprehended, as the police were already watching the shop. The judge left the facts to the jury, and they returned a verdict for the plaintiff, finding that the thieves were apprehended in consequence of R.'s information:—*Held*, affirming the judgment of the Court of Queen's Bench, that the information given by the plaintiff was not so remote as that it could not be said to have "led to" the apprehension of the thieves; and that the judge properly left the evidence to the jury, pointing out the remoteness of the information from the result.
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ARBITRATION—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125) *s.* 17—*Umpire, Appointment of, by Lot—Execution of Appointment of—Misconduct of Umpire.*] A lease of a farm for a term stipulated that, in the event of a sale of the premises during the term, the tenant upon notice should quit and deliver up possession to the landlord, and in such case each party should appoint a valuer to estimate the compensation to be given to the tenant for so quitting. The premises having been sold, the amount of compensation to be paid to the tenant was, by deed between the parties, submitted to the award of A. and B., or such third person as they should appoint umpire, under their hands to be indorsed on the submission before proceeding to value, with power to examine witnesses, &c.:—*Held*, that the reference was not merely to ascertain the amount of compensation or value to be paid to the tenant in the nature of an appraisement, but was an arbitration, within s. 17 of the Common Law Procedure Act, 1854. Each of the two arbitrators named an umpire, and each agreed that the umpire named by the other was a fit person; but not being able to agree which of the two nominees should be appointed, they decided the choice by lot:—*Held*, in accordance with *Neale* v. *Ledger* (16 East, 51), that the appointment of umpire was valid. The arbitrators, having thus decided upon the umpire to be appointed, agreed to meet to indorse the appointment on the submission; one only attended, and he signed the appointment and forwarded it to the other, who signed it the next day:—*Held*, that the arbitrators having previously agreed upon the umpire, the indorsing the appointment on the submission was not a judicial act, and need not be done by the arbitrators at the same time. After the last meeting had been held, the two arbitrators, the umpire, and the attorney of W. (one of the parties), dined with W. at his invitation, the umpire having afterwards made his award in favour of W.:—*Held*, that although this proceeding was very improper, it was not sufficient ground for setting aside the award, or for refusing to enforce it by rule, as it did not appear that there was any intention to corrupt or influence the umpire, or that he had been influenced.
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takes upon himself the functions of arbitrator by giving notice of his intention to proceed, but when he enters into the matter of the reference, either with both parties before him, or under a peremptory appointment enabling him to proceed ex parte.
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ruptcy of the latter the share of the dormant partner in the partnership stock in trade may be dealt with under s. 125 of 12 & 13 Vict. c. 106, as in the possession, order, or disposition of the bankrupt, as reputed owner, with the consent of the true owner. So held on the authority of decided cases; but *quære* by the Court whether the cases were rightly decided. [*Overruled in Ex. Ch., vide p.* 474 *and next case, inf.*]

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2. BANKRUPT—*Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 125—*Goods in Order and Disposition of Bankrupt—Reputed Owner—Joint-tenants—Partners.*] Where one partner allows the other bonâ fide to carry on the business ostensibly as his own, on the bankruptcy of the latter the share of the dormant partner in the partnership stock in trade cannot be dealt with under s. 125 of 12 & 13 Vict. c. 106, as in the possession, order, or disposition of the bankrupt, as reputed owner, with the consent of the true owner.

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3. ————, *Liabilities of Bankrupt, under repealed Sections of the Bankruptcy Act*, 1849 (12 & 13 *Vict. c.* 106)—"*Rights*" *and* "*Penalties*" *reserved by s.* 230 *of Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134).] The defendant was adjudged a bankrupt in 1857, and in 1858, his examination having been adjourned sine die without protection, on the ground of his not having fully disclosed his estate, a certificate (in form sch. B. a.) under s. 257 of the Bankruptcy Act, 1849, was obtained by the then assignees, and a ca. sa. issued, but the defendant, having left England, was not then arrested. In 1867, another ca. sa. was issued under the same certificate, at the suit of the present official assignee (the other assignees having died), under which writ the defendant was arrested:—*Held*, that though the sections of the Act of 1849, under which the proceedings were taken, were repealed by s. 230 of the Bankruptcy Act, 1861, the right of the assignees to arrest, and the liability of the defendant to be arrested, were "rights" and "penalties" preserved by the proviso in the repealing section; and the defendant was lawfully arrested at the suit of the present official assignee.

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4. ————, *Protection Order—Process—Arrest under an Order for not supporting Parents—43 Eliz. c.* 2, *s.* 7—12 & 13 *Vict. c.* 106, *ss.* 112 & 113.] A bankrupt, who had obtained an order of protection under s. 112 of 12 & 13 Vict. c. 106, was arrested on a warrant of commitment, for not obeying an order made on him under 43 Eliz. c. 2, s. 7, for payment of a weekly sum to the guardians of a union for the support of his mother:—*Held*, that the process under which the plaintiff was arrested was of a criminal nature, and not for a debt; and that he was, therefore, not protected from arrest under s. 113 of 12 & 13 Vict. c. 106.

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5. ————, *Defeating and delaying Creditors—Bill of Sale—Act of Bankruptcy—24 & 25 Vict. c.* 134, *s.* 73.] Under s. 73 of 24 & 25 Vict. c. 134, if an execution for a debt exceeding 50*l.* be levied by seizure and sale of the goods of a trader-debtor, he is to be deemed to have committed an act of bankruptcy; and if within fourteen days from the day of sale he is adjudged a bankrupt, the money is to be paid to the assignee under the bankruptcy. An execution was levied by seizure on the goods of a trader, and he then being insolvent, in consideration of the judgment creditor withdrawing the execution, assigned to the creditor the whole of his property, and ceased to carry

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on his trade. The jury having found the transaction bonâ fide :—*Held*, that as the creditors at large could have interfered and taken the proceeds of the execution under s. 73, there was no sufficient equivalent for the assignment to the execution creditor, which was therefore void and an act of bankruptcy.
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———————: *See* BANKRUPT.—BANKRUPTCY ACT, 1861.

BANKRUPTCY ACT, 1861 (24 & 25 *Vict. c.* 134), *s.* 198—*Debtor and Creditor—Arrest—Composition Deed—Discharge from Custody.*] A debtor was arrested on a ca. sa., and while in prison he executed and caused to be registered a composition deed under s. 192 of the Bankruptcy Act, 1861 :—*Held*, that although the deed was both executed and registered after the arrest, the debtor was entitled to his discharge under s. 198.
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2. ———————————, ss. 192, 197, garnishee paying debt under a judge's order after registration, but without notice of a deed under, not liable to an action for the debt by the trustees of the deed 73
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BASTARDY ORDER—*Jurisdiction of Justices—Previous Dismissal on Merits no Bar—*7 & 8 *Vict. c.* 101, *ss.* 2—4.] A bastardy summons, under 7 & 8 Vict. c. 101, s. 2, having been heard and dismissed on the merits, one of the chief witnesses for the defendant was afterwards convicted of perjury on the evidence he had given. A fresh application was then made, and on the hearing of the summons it was objected for the defendant that the justices had no jurisdiction, by reason of the previous dismissal on the merits. The justices determined to hear the application, saying the previous dismissal was obtained by false evidence ; and, having heard the applicant and corroborative evidence, made an order of affiliation :—*Held*, that the justices had jurisdiction, and the order was valid.
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BILL OF LADING, master of a vessel under a charterparty not amounting to a demise signing, is presumed to sign as agent of shipowner when existence of charterparty is unknown 86
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BILL OF SALE—*Assignee of Registered Bill of Sale, Priority of, over Assignee of earlier Unregistered Bill—*17 & 18 *Vict. c.* 36, *s.* 1.] The 17 & 18 Vict. c. 36, s. 1, requires that every bill of sale of goods shall be registered within twenty-one days after it is made, otherwise it shall be null and void as against all assignees in bankruptcy, or under any assignment for the benefit of the creditors of the person making the bill of sale, and as against all sheriffs' officers, &c., executing process against, and the execution creditors of, such person, as to any of the goods which are then in his possession. The defendant made a bill of sale of his goods to S. which was not registered ; afterwards he made another bill of sale of the same goods to H. which was registered. Execution having issued against the defendant, the goods still remain-

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ing in his possession, S. and H. both claimed the goods, and an order was made by which the execution creditors were barred, and the proceeds of the goods ordered to be paid to H.:—*Held*, that the order was right, and that S. could not, under the circumstances, set up against H. the prior unregistered bill of sale; for that the consequence of avoiding an unregistered bill of sale by execution is to displace the security altogether.
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BREAD—*Sale of, otherwise than by Weight*—6 & 7 *Wm.* 4, *c.* 37, *s.* 4—3 *Geo.* 4, *c. cvi. s.* 4.] Section 4 of 6 & 7 Wm. 4, c. 37, enacts that all bread within the limits of the act shall be sold by weight, and any baker or seller of bread who shall sell or cause to be sold any bread in any other manner than by weight shall forfeit a sum not exceeding 40s. The practice in the appellant's bakery and shop was to weigh out dough for 2lb., 4lb., and 8lb. loaves before putting them into the oven, allowing 5 oz. for shrinkage of a 4lb. loaf, which is the understood weight of a "quartern" loaf, but not to weigh the loaves afterwards unless required by the customer. A customer asked, in the appellant's shop, for a "quartern" loaf, and one was handed to him, and the current price of a 4lb. loaf was asked and paid for it. The customer did not require to have the loaf weighed, and it never had been weighed since it was baked; it turned out 2 oz. 9drs. deficient of 4lbs.:—*Held*, that the appellant was rightly convicted under the above section.
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CARRIER OF PASSENGERS—*Measure of Obligation as to Roadworthiness of Carriage—Railway Company.*] A carrier of passengers for hire is bound to use the utmost care and skill in everything that concerns the safety of the passengers; but he is not bound at his peril to provide a carriage roadworthy at the commencement of the journey; and if the carriage turns out to be defective, he is not liable to a passenger for the consequences, if the defect was of such a nature that it could neither be guarded against in the process of construction, nor discovered by subsequent examination: by Mellor and Lush, JJ. But by Blackburn, J., there is an obligation on a carrier of passengers to

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provide at his peril a vehicle in fact reasonably sufficient for the journey, and he is responsible for the consequences of any insufficiency, though arising from a latent defect.
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See POOR-RATE. 1.

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COMPANIES ACT, 1862 (25 & 26 *Vict. c.* 89), *ss.* 161, 162—*Arbitration—Appointment of Umpire by Judge's Order—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 12.] By ss. 161, 162 of the Companies Act, 1862, on any company being voluntarily wound up, it is lawful by special resolution to transfer the business, &c. to a new company, provided that any dissentient shareholder may require the liquidators either to abstain from carrying the resolution into effect, or to take his shares at a price, if not agreed upon, to be determined by arbitration under the provisions of the Companies Clauses Consolidation Act, 1845. That act (8 Vict. c. 16), by ss. 128—130, provides for the appointment of two arbitrators, one by each party; and the arbitrators are to appoint an umpire; but in case of their default, s. 131 only provides that, if one of the parties be a railway company, the appointment of an umpire is to be by the Board of Trade. A dispute as to the price to be paid for his shares having arisen between a shareholder and a company not a railway company, and the arbitrators having neglected to appoint an umpire:—*Held*, on the authority of *Re Lord* (1 K. & J. 90; 24 L. J. (Ch.) 145), that the case was within s. 12 of the Common Law Procedure Act, 1854, and a judge could therefore appoint an umpire under that section.
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COMPANY—*Transfer of Shares, Registration of—Calls unpaid—Companies Clauses Consolidation Act* (8 *Vict. c.* 16), *s.* 16.] Section 16 of 8 Vict. c. 16 enacts that no shareholder shall be entitled to transfer any share, after any call has been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him:—*Held*, that the section only applies to the transfer of shares on which a call can be and has been made, and has no application to the transfer of shares on which all the calls have been paid; and a company, therefore, is bound to register a transfer of stock, although the transferror be the holder of

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shares on which there are calls unpaid. [*Affirmed in Ex. Ch. vide p.* 471 *and next case, inf.*]
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2. COMPANY—*Transfer of Shares, Registration of—Calls unpaid—Companies Clauses Consolidation Act* (8 *Vict. c.* 16), *s.* 16.] Section 16 of 8 Vict. c. 16, enacts that no shareholder shall be entitled to transfer any share after any call has been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him:—*Held*, affirming the judgment of the Court of Queen's Bench, that the section only applies to the transfer of shares on which a call can be and has been made, and has no application to the transfer of shares on which all the calls have been paid; and a company therefore is bound to register a transfer of stock, although the transferror be the holder of shares on which there are calls unpaid.
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COMPENSATION—*Construction of Statutes incorporating the Lands Clauses Consolidation Act, with Exception in General Terms—8 Vict. c.* 18, *ss.* 5, 121—*London City Improvement Act*, 1847 (10 *& 11 Vict. c. cclxxx.*), *ss.* 1, 19, 21—*Holborn Valley Improvement Act*, 1864 (27 *& 28 Vict. c. lxi.*), *s.* 5.] By s. 1 of the London City Improvement Act (10 & 11 Vict. c. cclxxx.) the Lands Clauses Consolidation Act is incorporated so far as the provisions are not expressly varied or excepted by s. 19, "so much of the Lands Clauses Consolidation Act as relates to the purchase of land otherwise than by agreement" is not to be incorporated in this act; by s. 5 of the Holborn Valley Improvement Act (27 & 28 Vict. c. lxi.) all the provisions, &c. of the London City Improvement Act, except s. 19, and of the Lands Clauses Consolidation Act, except "the part with respect to the purchase and taking of lands otherwise than by agreement," are incorporated, except so far as the said provisions, &c. are repealed, altered, or varied by, or are inconsistent with, the provisions of this act:—*Held*, that the Lands Clauses Consolidation Act was incorporated with both the special acts, excepting only the clauses (16—68) which come under the heading "with respect to the purchase and taking of lands otherwise than by agreement;" and that the other clauses, which relate to the purchase of lands otherwise than by agreement, but do not come under that heading, were not excepted. Section 121 of the Lands Clauses Consolidation Act, which enacts that compensation to a person having no greater interest than as tenant from year to year shall be determined by two justices, comes as a proviso upon the clauses which enact in general terms that compensation for any interest in land is to be assessed by a jury: and s. 121 may therefore be treated as a proviso to, and not inconsistent with, the clauses in the special acts which enact in equally general terms that compensation for any interest in land is to be assessed by a jury; consequently, compensation to a person having no greater interest than as tenant from year to year in premises required under the Holborn Valley Improvement Act can only be determined by justices.
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CONTRACT—*Construction—Sale of Specific Goods—Clause as to Decision by Selling Brokers—Condition or Warranty.*] The defendant bought of the plaintiffs, at a price named, "413 bales of wool, to arrive ex *Stige*, or any vessel they may be transhipped in. The wool to be guaranteed about similar to samples in the selling broker's possession; and if any dispute arises it shall be decided by the selling brokers, whose decision shall be final." On the arrival of the wool, it turned out not about similar to sample, and the brokers, after protest from the defendant, awarded that the defendant should take it at a certain abatement in the price of different bales:—*Held*, that as the contract was for the sale of specific goods, the guarantee was not a condition but only a warranty, and the defendant could not reject the wool on account of its inferiority; that the brokers had power to award as they had, and the defendant was bound to take the wool accordingly.
HEYWORTH AND OTHERS *v.* HUTCHINSON 447

2. ———————, *Rescission—Misrepresentation—Failure of Consideration—Company—Misrepresentation in Prospectus.*] In order to entitle a party to rescind a contract, it is sufficient to shew that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But when there has been only an innocent

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misrepresentation, it is not ground for a rescission, unless it was such as that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration. A company, already carrying the intercolonial mails under contracts with the government of New Zealand, issued a prospectus that they were "prepared to receive applications for new shares in order to enable the company to perform the contract recently entered into with the government of New Zealand, for a monthly mail service between Sydney, New Zealand, and Panama, in correspondence with the West Indian Mail Company's steamers between Southampton and Panama." K., induced by this statement in the prospectus, applied for and obtained some of the new shares. The contract alluded to in the prospectus had been made by the company with the agent of the New Zealand government, both parties bonâ fide believing that he had authority to make it; but it turned out that he had no such authority, and the government refused to ratify the contract:—*Held*, that the prospectus by implication alleged that there was a binding contract, but being an innocent misrepresentation it did not entitle K. to rescind the contract under which he became a shareholder, as it did not affect the substance of the matter, K. having got shares in the very company for which he had applied, and which shares were of considerable value.

LORD GILBERT KENNEDY *v.* THE PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL COMPANY (LIMITED). THE PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL COMPANY (LIMITED) *v.* LORD GILBERT KENNEDY 580

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COPYRIGHT—5 *&* 6 *Vict. c.* 45, *ss.* 13, 24, *and sch.—International Copyright Act* (7 *Vict. c.* 12), *s.* 6—*Entries in Register of Proprietorship and Assignment—"Author or Composer"—Arrangement for the Pianoforte of Score of an Opera—Rights of Assignee.*] By s. 6 of the International Copyright Act, 7 Vict. c. 12 (which incorporates the Copyright Amendment Act, 5 & 6 Vict. c. 45), no author of any musical composition first published in a foreign country shall be entitled to the benefit of the act unless, within the time mentioned in the Order of Council applying to that country, the musical composition shall have been registered, with the following particulars:—Title of the work, name and place of abode of the author or composer, time and place of the first publication in the foreign country. N. composed and published an opera in full score at Berlin, and after his death B. arranged the score of the whole opera for the pianoforte, also the overture for the piano, and the whole opera pour le piano seul; in registering these arrangements in England, N.'s name was inserted as composer:—*Held*, that the arrangements for the pianoforte were independent musical compositions, of which B., not N., was the composer; and the entry made under s. 6 was invalid, and gave no title to the assignee of the registered compositions. The time of first pub-

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lication of one of these compositions was entered as 1850, without any day or month.

Semble, by Blackburn, J., that this was not sufficient. By s. 13 of 5 & 6 Vict. c. 45, the registered proprietor of copyright may assign his interest by making entry in the register of such assignment and of the name and place of abode of the assignee in the form given in the schedule; the form omits all mention of the place of abode. By s. 24 no proprietor of copyright shall maintain an action for infringement unless he has made an entry in the register pursuant to the act. An entry, purporting to be an assignment of a musical composition, omitted the place of abode of the assignee.

Quære, whether the entry was not defective? but *quære*, also, whether, if there were a valid entry of the original proprietorship and a valid assignment otherwise than by an entry on the register, the assignee could not maintain an action?

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COUNTY COURT—*Rule upon Judge of County Court to proceed*—19 & 20 *Vict. c.* 108, *s.* 43—*Jurisdiction of Court over Costs in County Court—Interpleader Claim, Particulars of.*] A judge of a county court having refused to hear an interpleader claim on the ground of insufficiency of particulars, and having ordered the claimant to pay costs, the Court, on ruling the judge, under 19 & 20 Vict. c. 108, s. 43, to hear the claim, has no jurisdiction to set aside the order as to costs. *Whitehead* v. *Procter* (3 H. & N. 532) dissented from on this point.

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COVENANT RUNNING WITH REVERSION—*Covenant to leave Land at end of Term well stocked with Game—Incorporeal Hereditament*—32 *Hen.* 8, *c.* 34.] C. granted and demised the exclusive right and licence to take and kill game on certain land, with the use of a cottage, to the defendant for a term; and the defendant covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise. C. assigned his reversion in the land and hereditaments to the plaintiffs; and they brought an action, at the end of the term, against the defendant for a breach of his covenant:—*Held*, that the demise was not a mere licence, but the grant of an incorporeal hereditament; that the covenant touched the hereditament demised, and by virtue of 32 Hen. 8, c. 34, the assignees of the reversion could sue upon it.

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CUSTOM—*Time immemorial—Prescription—Marriage Fee—Rankness.*] From the year 1808 to the present time the fee paid on the celebration of a marriage in a parish church was proved to have been almost uniformly 13*s*. There was no evidence extending beyond 1808:—*Held*, by Cockburn, C.J., Mellor and Lush, JJ., that the amount of the fee, being so great as to lead to the irresistible inference that it could not have existed in point of fact in the time of Richard I., was sufficient in itself to rebut the presumption, arising from modern enjoyment, that the fee had an immemorial legal existence. By Blackburn, J., that the doctrine of rankness is confined to moduses; and that the large amount of a customary payment, shewn to have been in fact taken as of right as long as living memory or evidence goes, is not enough to rebut the presumption that the usage had a legal origin.
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DEATH, what amounts to such an entry against interest, or in course of business, as to be admissible in evidence after 326
See EVIDENCE. 4.

DEBT, rent is a, which may be attached under Common Law Procedure Act, 1854, s. 61 259
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DEBTOR AND CREDITOR—*Composition Deed—Fraud.*] Declaration on the money counts. Plea, that by a deed of arrangement made in pursuance of the law of New South Wales, and made between the defendant of the first part, certain trustees of the second part, and the creditors of the defendant named in a schedule to the deed of the third part, the defendant assigned all his estate to the trustees in trust for distribution equally among all his creditors; and that by the deed the parties of the second and third parts did, if and when the deed should have been executed by four fifths in number and value of the creditors, release the defendant from all demands, &c.; that the deed was executed by such majority, and amongst others by J. W. D., one of the plaintiffs; and that the defendant was released from all causes of action. The replication, on equitable grounds, averred that the plaintiff, J. W. D., executed the deed on the faith of the several provisions therein contained, but that it was never executed by any of the other plaintiffs; that the defendant agreed with certain of his creditors, being other than the plaintiffs, to pay or secure to such creditors, in consideration of their executing the deed, certain pecuniary and valuable benefits and preferences over the others, and thereby induced such preferred creditors to execute the deed; and that such agreement was made, and such execution by the preferred creditors procured, without the knowledge or consent of the plaintiffs or of the creditors of the defendant other than the preferred creditors; and that the defendant procured the deed to be executed by such majority as in the plea mentioned by the fraudulent agreement:—

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Held, on demurrer, that the deed was void against the plaintiffs, on the ground that, in order to make such a deed binding upon the creditors, there must be perfect good faith between all the creditors and the debtor, and no creditor be induced to sign the deed in consequence of receiving some benefit beyond the rest of the creditors.

DAUGLISH AND OTHERS *v.* TENNENT 49

2. DEBTOR AND CREDITOR—*Bankruptcy—Garnishee—Rights and Liabilities of Judgment Creditor, Garnishee, and Assignees under Composition Deed or Bankruptcy—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 197—*Bankruptcy Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 184—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 61—65.] Declaration, for a debt due from the defendant to S., by the plaintiffs as trustees under a deed for the benefit of the creditors of S. under the Bankruptcy Act, 1861, all the requirements of which had been complied with so as to vest the debt in the plaintiffs. Plea, that a judgment creditor of S. had obtained an order, attaching the defendant's debt and calling on him to shew cause why he should not pay it to the judgment creditor. That the defendant having no notice of the trust deed had no cause to shew, and an order was made upon him to pay the debt to the judgment creditor. That this order was, before the defendant had any notice of the trust deed, served upon him, and the defendant, in compliance with the order, and to avoid and because he could not otherwise have avoided execution, paid the debt to the judgment creditor. Replication, that the trust deed was registered under the Bankruptcy Act, 1861, before payment by the defendant to the judgment creditor. On demurrer to the replication:—The Court, reversing the judgment of the Queen's Bench, gave judgment for the defendant, holding: That a deed for the benefit of creditors under the Bankruptcy Act, 1861, all the requirements of which have been complied with so as to bring s. 197 into operation, is, when registered, equivalent to an adjudication of bankruptcy. That, though the payment by the defendant to the judgment creditor was made after the registration of the deed, the plea must be taken to mean, either that the defendant paid without notice of the deed, or, if with notice, that it was under such circumstances that he was unable to get the order set aside before he was compelled to pay to save execution being actually levied; and that, in either case, the payment was a protection to the defendant, the garnishee, as made under an order of a court of competent authority.

Semble, that the plaintiffs' remedy was against the judgment creditor for money received to their use; as he was in the position of a person having security for his debt, but not a lien, within s. 184 of the Bankruptcy Act, 1849.

Semble, also, that if the garnishee has notice of a trust deed or bankruptcy before the time for shewing cause against the ex parte order has elapsed, he would be bound to shew cause, and if he were to pay to the judgment creditor, instead of shewing cause, the assignees could recover the debt from him.

Quære, whether, if the garnishee has notice of a trust deed or bankruptcy, after the order for payment has been made and served, but before payment, he would be safe in paying without taking any other step; or whether he would be bound, if there were opportunity, to apply to get the order set aside; or whether it would be sufficient to give the assignees notice that he should pay, unless they got the order set aside.

WOOD AND OTHERS *v.* DUNN .. .. Ex. Ch. 73

3. ——————————, *Attachment of Debt — Rent — Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 61.] Rent is a

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debt which may be attached, under s. 61 of the Common Law Procedure Act, 1854, which enacts that, where judgment has been recovered and is still unsatisfied, and any third person is indebted to the judgment debtor, a judge may order that "all debts owing or accruing" from such third person to the judgment debtor shall be attached to answer the judgment debt.
MITCHELL *v.* LEE. IVEY, GARNISHEE; JONES AND ANOTHER, CLAIMANTS 259

4. DEBTOR AND CREDITOR: *See* BANKRUPTCY ACT, 1861.

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DISQUALIFYING INTEREST, what amounts to, in Sheriff under Lands Clauses Consolidation Act, 1845, s. 39 336
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DISTRESS—*Landlord and Tenant—Entry by opening Window.*] An entry into a house, for the purpose of distraining, by opening a window which is shut but not fastened, is unlawful. A broker went with a warrant of distress for rent to the demised premises, the front door of which he found fastened. In the course of the day a man in the employ of the landlord was allowed by the tenant to enter at the front door, in order to get access to the area for the purpose of removing and repairing a grating over it which was in a dangerous state. While the repairs were going on the tenant left the house, having fastened both the front and area doors, and the man, who had got into the area to refix the grating, having refixed it, found himself unable to get out. The broker suggested to the man to try the window which opened into the area and was closed. The window was found to be unfastened, and the man pulled the sash down, got into the house, and unfastened the front door from the inside. On the front door being thus opened, the broker entered and distrained:—*Held*, that the transaction must be taken as one, and that, as the entry was by opening a window, the distress was unlawful.
Quære, whether, if the door had been unfastened and opened by an independent third person, the entry by the broker would have been lawful 590
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——— in register under Copyright Acts, form of 340
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——— into a house by opening a window for the purpose of making a distress is unlawful 590
See DISTRESS.

EVIDENCE—*Probate of Will in common Form, conclusive Evidence as to Realty, under* 20 *&* 21 *Vict. c.* 77, *s.* 64.] Under s. 64 of 20 & 21 Vict. c. 77, if notice of the intention of one party to a cause to give in evidence the probate of a will, as proof of a devise of real estate, be given to the opposite party ten days before the trial, and within four days of the receipt of such notice a counter notice be not given that the validity of the devise is disputed, the probate in common form is *conclusive* evidence of the validity of the devise. [*Reversed in Ex. Ch. vide p.* 612, *and next case, inf.*]
BARRACLOUGH *v.* GREENHOUGH 1

2. ———, *Probate of Will, how far Evidence as to Realty, under* 20 *&* 21 *Vict. c.* 77, *s.* 64—*Practice—Service of Notice in a Cause.*] By s. 64 of 20 & 21 Vict. c. 77, in any action or suit, where, under the existing law, it would be necessary to produce and prove an original will to establish a devise of real estate, the party relying on the devise "may give to the opposite party, ten days at least before the trial, notice that he intends to give in evidence, as proof of the devise, the probate of the will, and such probate shall be *sufficient* evidence of the will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, unless the party receiving the notice, within four days after the receipt, give notice that he disputes the validity of the devise:"—*Held* (reversing the decision of the Queen's Bench), that the party receiving the notice, although he had not given a counter notice within four days, was not precluded at the trial from contesting the validity of the will.
Quære, whether the notice ought not to be served on the attorney in the cause, and whether service on the party is sufficient.
BARRACLOUGH *v.* GREENHOUGH .. .. .. Ex. Ch. 612

3. ———, *Presumption—Parish, Boundary of—Land between High-water and Low-water Mark on Tidal River.*] Where a parish extends up to a tidal river, but there is nothing to shew whether it does or does not extend beyond the line of ordinary or medium high-water mark, land between such high-water and low-water mark cannot be assumed to be within the parish: as there is no distinction in this respect between land on the sea-shore and land on the shore of a tidal river.
THE TRUSTEES OF THE DUKE OF BRIDGEWATER'S ESTATES, Appellants. THE SURVEYORS OF HIGHWAYS OF BOOTLE-CUM-LINACRE, Respondents 4

4. ———, *Entry by Deceased Person against Interest, or in Course of Business—Account Sales.*] It was the duty of a confidential clerk, who managed a branch business of the plaintiffs, as general merchants, to keep them duly advised of all business transacted; in discharge of this duty, he wrote them a letter, stating that the defendant had sent three cases to the office, and giving details of the transaction under which they were sent:—*Held*, that this letter was not admissible in evidence against the defendant after the clerk's death, as it was neither a declaration against direct pecuniary interest, nor an entry made in

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the discharge of a duty to do a particular act and make a record of it.

Quære, whether, where goods are consigned to an agent in England for shipment and sale in a distant country, it may not be taken as an implied term of the agreement by the consignor, that the account sales rendered by the agent's correspondent abroad shall be good primâ facie evidence of the amount realised by the sale?

SMITH AND OTHERS *v.* BLAKEY 326

5. EVIDENCE — *Witness, Commission to examine — Variance between Judge's Order and Commission—1 Wm. 4, c. 22, ss. 4, 10.*] A judge's order, under 1 Wm. 4, c. 22, s. 4, ordering a commission to issue for the examination of witnesses abroad, contained a clause that "the depositions of every witness be signed by him and the commissioner." The writ of commission contained no such clause. The commission was duly executed, and the depositions returned without the signature of the witnesses:—*Held*, that the clause in the order was merely directory, and that a non-compliance with it did not render the depositions inadmissible in evidence under s. 10 against the defendant, who had refused to join in the commission.

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FRIENDLY SOCIETY — *Enforcing Rules — Settlement of Disputes — Trades Union, illegality of*—18 & 19 *Vict. c.* 63, *ss.* 9, 24, 44.] By section 44 of 18 & 19 Vict. c. 63, the sections of the act as to settling disputes between members and the punishment of defaulting officers are to apply, "in the case of any friendly society established for any of the purposes mentioned in sect. 9, or for any purpose which is not illegal," though the rules have not been certified, provided a copy has been deposited with the registrar:—*Held*, that a society, of which one of the objects was the relief of sick, disabled, and aged members, and the burial of dead members, but of which one of the main objects was that of a trades union, and the support of members when on strike, was not within the section; as this purpose was not analogous to those in sect. 9, and, moreover, was an illegal purpose, in the sense of not being enforceable at law, as being in restraint of trade.

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———— what amounts to a disqualifying interest in a sheriff under the Lands Clauses Consolidation Act, 1845, s. 39 336
See SHERIFF. 1.

INTERNATIONAL COPYRIGHT ACT, s. 6 340
See COPYRIGHT.

INTERROGATORIES—*Common Law Procedure Act*, 1854 (17 & 18 *Vict.* c. 125), s. 51—*Practice—Who entitled to Attachment—Companies Act*, 1862—*Officers of Body Corporate—Official Liquidator.*] An action having been brought by an official liquidator, in the name of a company that was being wound up by the Court of Chancery, to recover arrears of calls, the defendant obtained an order to administer interrogatories to certain directors of the company, and for a stay of proceedings. The directors not having answered the interrogatories, an application was made by the official liquidator for an attachment against them:—*Held*, that the directors did not cease to be officers of the company on the commencement of the winding-up, and that they

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were therefore bound to answer the interrogatories; and that, although the official liquidator was not the party who had obtained the order for the interrogatories, nor a party on the record, he was under the circumstances so interested in the matter as to be entitled to apply for an attachment.
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——— to make a bastardy order after a previous dismissal of the case 446
See BASTARDY ORDER.

JUSTICES—*Jurisdiction—Claim of Title—Parish Property, Warrant for Possession of—59 Geo. 3, c. 12, s. 24.*] In a proceeding to recover possession of a house alleged to belong to a parish, under 59 Geo. 3, c. 12, s. 24, the jurisdiction of the justices is not ousted by a claim of title, as the question of title is necessarily involved in the matter which the justices have to determine.
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2. ———, jurisdiction of, to make a bastardy order after a previous dismissal of the case 466
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——— liable to a profit à prendre, liability to poor-rate in respect of .. 482
See POOR-RATE. 4.

LANDLORD AND TENANT—*Yearly Tenancy, Assignment of—Privity of Contract—Action by Assignee.*] The defendant demised a farm for a term of fourteen years; the lease contained a covenant by the lessees not to assign without licence, with a proviso for re-entry, and a covenant by the lessor at the expiration of the tenancy to pay for certain things at a valuation. At the expiration of the term, the lessees continued tenants from year to year on the terms of the original lease. They afterwards, by deed, assigned their interest in the premises, with their right to be paid for the things at a valuation, to the plaintiff. The plaintiff entered into the occupation of the

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premises, but never paid rent, nor did the defendant ever recognise him as his tenant. The defendant gave the lessees the proper six months' notice to quit, and the plaintiff gave the defendant a similar notice:—*Held*, that the plaintiff could not maintain an action against the defendant for the amount of the things at a valuation. Per Mellor and Lush, JJ., on the ground that no new tenancy had been created between the plaintiff and defendant, and that the bare assignment of the parol tenancy did not pass to the assignee a right of action upon the special stipulation. Per Shee, J., on the ground that, as the lessees had no power to assign without licence, they could not transfer any interest in the premises to the plaintiff.
ELLIOTT *v.* JOHNSON 120

2. LANDLORD AND TENANT, cost of repairs done by tenant under clause in the lease not deducted in ascertaining rateable value of premises 542
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3. ——————————, distress made by opening a window which is shut but not fastened, is unlawful 590
See DISTRESS.

LANDS CLAUSES CONSOLIDATION ACT, 1845 (8 *Vict. c.* 18)—*Compensation for Severance—Accommodation Works, under Railways Clauses Consolidation Act* (8 *Vict. c.* 20), *ss.* 68, 69.] By the construction of a railway, part of an owner's land was taken, and several acres were severed from the rest, and all access cut off; the land was at the time the railway was constructed agricultural, but it had a prospective value for building:—*Held*, that the compensation jury, valuing it as building land, might estimate the damage by severance as if all access were cut off, without any regard to the power of justices to order accommodation works under ss. 68 & 69 of the Railways Clauses Consolidation Act; as those works could only be ordered with reference to the land as then used for agricultural purposes, and would have been useless as an access to building land.
THE QUEEN *v.* BROWN 630

2, 3. ——————————————————, ss. 39, 68 336, 223
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LICENSED VICTUALLER—*Metropolitan Police and other Districts—Licences necessary to sell Exciseable Liquors off Licensed Premises—* 25 *Vict. c.* 22, *s.* 13; 26 *& 27 Vict. c.* 33, *s.* 20; 27 *& 28 Vict. c.* 64, *ss.* 5, 7.] A licensed victualler, who has obtained an occasional licence from the excise, with the consent of a justice of the peace, under 25 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20, to sell exciseable liquors on the occasion of a public ball on unlicensed premises, must also, within the metropolitan police district, or other limits to which the 27 & 28 Vict. c. 64 shall have been applied, obtain the licence of the local authority under ss. 5 & 7 of the last act, in order to sell between the hours of 1 and 4 A.M.
HANNANT, Appellant; FOULGER, Respondent 399

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LIGHT, effect of Metropolitan Building Act, 1855, upon an obstruction to 194
See METROPOLITAN BUILDING ACT, 1855.

LOCAL BOARD OF HEALTH—*Election—Chairman's Duties*—11 & 12 *Vict. c.* 63, *s.* 27—*Quo Warranto.*] At the election of members of a local board of health, under 11 & 12 Vict. c. 63, the chairman, or a duly appointed deputy, must attend at the office of the board the day after the election, as returning officer, and perform in person the duties, which are judicial, of examining the votes, &c., as required by s. 27; and if assessors, appointed under s. 21, make the examination in the chairman's absence, and he signs the returns, &c., on their report only, and not on personal inspection, the election is void.
THE QUEEN *v.* BACKHOUSE 16

2. ——————————, *Form of Proceedings—Committee—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *ss.* 34, 36, 69, 149—*Notices to pave, &c. Streets.*] Section 36 of the Public Health Act, 1848, enables a local board of health to appoint so many out of their own number to act as a committee, provided the acts of the committee shall be submitted to the board for their approval. By s. 149, whenever the consent, sanction, approval, or authority of the local board is required by the provisions of the act, the same shall, in the case of a non-corporate district, be in writing under their seal and the hands of five of them. By s. 69, if a street be not paved, &c., to the satisfaction of the local board, the board may, by notice in writing, require the owners or occupiers of premises abutting upon the street, to pave, &c. the parts on which they abut within a given time, and in default the board may do the work themselves, and recover the expenses, to be apportioned by the surveyor, from the owners, &c., in a summary way. A local board of health of a non-corporate district appointed a streets committee, and afterwards passed a resolution that the minutes of the committee resolving that notices be given to pave, &c., certain streets be approved by the board; this resolution was signed by the chairman, according to the bye-laws (made under s. 34). Notices were accordingly sent under s. 69, signed by the clerk of the board, to the owners, and subsequently, on default, a resolution of the board was passed, signed as the former one, that the minutes of the committee, resolving that the board be recommended to do the work by their surveyor, be approved. The work was accordingly done, and the expenses apportioned by the surveyor. Justices having refused, on summons, to enforce the payment of the expenses against the owners:—*Held*, that none of the proceedings needed to be under the seal and hands of five of the board, as all the acts were acts of the board themselves, which did not need to be authenticated as required by s. 149, that the proceedings were therefore valid, and the justices were bound to enforce payment.
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LONDON CITY IMPROVEMENT ACT, 1847, ss. 1, 19, 21 .. 292
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MARINE INSURANCE—*Concealment, when avoids Insurance—Principal and Agent—Fraud of Agent, Principal affected by—Duty of Agent to telegraph Loss.*] An agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship and cargo, ought to do so by electric telegraph, where that means of communication is in general use; and if the agent omits to discharge this duty, and the principal, being thus left in ignorance of a fact material to be communicated to the underwriter, effects an insurance, the insurance is void, on the ground of conceal-

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ment or misrepresentation. The plaintiff, in Liverpool, employed an agent at Smyrna to buy madder on his account, and to ship and consign the cargoes to him; the agent purchased and shipped a cargo of madder, and advised the plaintiff on the 12th of January, and sent the shipping documents on the 19th of January. The ship sailed on the 23rd of January, but was stranded in the course of that day, and the cargo became a total loss. Intelligence of the loss was communicated to the agent on the 24th of January, and on the 26th, the next post-day, he wrote to the plaintiff announcing the loss, but purposely abstained from telegraphing, in order that the plaintiff might not be prevented from insuring. The plaintiff, on the 31st of January, after the receipt of the letters of the 12th and 19th, but before the receipt of the letter of the 26th, and without any knowledge of the loss—which, however, had been telegraphed and posted in Lloyd's lists—effected an insurance:—*Held*, that the plaintiff could not recover against the underwriter.

PROUDFOOT *v.* MONTEFIORE 511

2. MARINE INSURANCE—*Concealment of material Fact by Assured—Means of Knowledge of Underwriter.*] A person proposing a marine insurance is bound to communicate every fact within his knowledge that is material; though, if a particular fact be known to the underwriter at the time, he cannot afterwards set up as a defence to an action on the policy that the fact was not communicated; but if a material fact be not communicated, which, though known to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; and it is not enough for the assured to shew that the particulars supplied by the assured, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated. During the late American war, in 1863–4, the *Georgia* screw steamer obtained notoriety as a cruiser in the service of the Confederate States; in May, 1864, she put into Liverpool, where she was dismantled, and this was also a subject of public notoriety, and, as such, known to the defendant, an underwriter at Lloyd's at Liverpool; she was bought by the plaintiff at public auction, and converted by him into a merchant vessel. In August, 1864, the plaintiff, through his broker in London, effected with the defendant an insurance of the vessel for six months. The particulars furnished by the plaintiff were, *Georgia* S.S., chartered on a voyage from Liverpool to Lisbon and the Portuguese settlements on the west coast of Africa and back. The vessel sailed from Liverpool, and was immediately captured by a frigate of the United States. In an action on the policy to recover for the loss, the defendant set up as a defence the concealment of the fact that the *Georgia* proposed for insurance was the late Confederate war steamer, and therefore liable to capture by the United States. The jury found, that the defendant was not aware that the *Georgia* which he was insuring was the Confederate steamer, but that he had, at the time of underwriting, abundant means of identifying the ship from his previous knowledge, coupled with the particulars given by the plaintiff:—*Held*, that the defendant was entitled to the verdict.

BATES *v.* HEWITT 595

MARRIAGE FEE, what prescription necessary to establish a right to .. 161
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MASTER AND SERVANT—*Threats to Master, under* 6 *Geo.* 4, *c.* 129, *s.* 3—*Illegal Combination.*] At the hearing of an information against the appellants, W. and B., under 6 Geo. 4, c. 129, s. 3, for unlawfully, by certain threats, forcing, or endeavouring to force, the respondent to limit the number of his apprentices, the following facts were proved:—The respondent was a master builder, and the appellants were members of a Bricklayers' Association, W. being president and B. secretary. The respondent being engaged on a building, B. having spoken to two of the men, they left work; and on the respondent asking B. why the men had been stopped, B. said: "You must know; it is on account of your apprentices." The respondent at this time had four apprentices; and all his men stopped work, being at liberty, under their engagement, to leave at any time. Two or three weeks after the stoppage, the respondent wrote to B., as secretary of the association: "Will you inform me why my men were taken away from me? I heard it was because I employed too many apprentices; of this I had no notice. I should like you to let me know what you require me to do." At a meeting of the association, at which W. acted as president and B. as secretary, an answer was written by B., and sent to the respondent: "At a meeting of the society, it was resolved unanimously—That no society bricklayer will work for T. B. (the respondent) until he parts with some of his apprentices: namely, he will be allowed two; and when his oldest apprentice arrives at his last year, he will be allowed a third: and, further, there will be so much expenses to pay before any society bricklayer will work for T. B.—By order of the society." Shortly afterwards, a demand for 18*l.* was made on the respondent by W., who stated that the money must be paid before they would allow any man to work for him. The justices, "being of opinion that the evidence brought the case within s. 3 of 6 Geo. 4, c. 129," convicted the appellants of the above offence:—*Held*, on a case stated under 20 & 21 Vict. c. 43, that, as the justices had not stated that they had drawn the inference that the communication of the resolution in answer to the respondent's inquiries was intended as a threat, the evidence without such inference (which the Court thought ought not to be drawn) was not sufficient to justify the conviction.

Quære, whether the combination of the workmen was illegal.

WOOD AND BARROW, Appellants; BOWRON, Respondent 21

2. ——————————, *Liability of Master to Servant for Negligence —Foreman a Fellow Servant.*] The rule, that a master is not liable to a servant for injuries sustained from the negligence of a fellow servant in their common employment, is not altered by the fact that the servant guilty of negligence is a servant of superior authority, whose lawful directions the other is bound to obey. The defendant was a maker of locomotive engines, and the plaintiff was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood supported by piers of brickwork. The piers had been recently repaired, and the brickwork was fresh. The defendant retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved on, having just before ordered the plaintiff to get on the engine to clean it. The plaintiff having got on the engine, the piers gave way, the engine fell, and the plaintiff was injured. This was the first time the crane had been used and the plaintiff employed in this manner:—*Held*, that there was no evidence to fix the defendant with liability to the plaintiff: for that, assuming the foreman to have been guilty of negligence on the present occasion, he was not the representative of the master so as to make his acts the acts of the master; he was merely a fellow servant of the plaintiff, though with superior authority; and there was nothing to shew that

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he was not a fit person to be employed as foreman; neither was there any evidence of personal negligence on the part of the defendant, as there was nothing to shew that he had employed unskilful or incompetent persons to build the piers, or that he knew, or ought to have known, that they were insufficient.

FELTHAM *v.* ENGLAND 33

3. MASTER AND SERVANT—*Truck Act* (1 *&* 2 *Wm.* 4, *c.* 37), *s.* 23—*Wages, Contract for Deductions from.*] Section 23 of the Truck Act (1 & 2 Wm. 4, c. 37) permits an employer of an artificer to contract to supply the artificer with medicine, medical attendance, and materials to be employed in his occupation, if a miner, and to demise to the artificer a tenement at any rent reserved; and to contract to make stoppages or deductions from the wages in respect of rent, medical attendance, &c., provided the contract for such stoppages be in writing, and signed by the artificer:—*Held*, that the amount to be deducted in respect of each head of deduction need not be specified in the written contract. Under a contract in writing, allowing stoppage to be made for medicine and medical attendance, the employer may deduct 6*d.* a week, which by the practice of the mine was paid by each miner towards a club kept by the employer for the purpose of providing medicine and medical attendance for such miners as required them. The contract as to the supply of materials, in order to be within s. 23, must be shewn to be an absolute contract of sale, and not a mere contract of hiring by the artificer.

CUTTS *v.* WARD 357

4. ——————————, *Threats to Master, under* 6 *Geo.* 4, *c.* 129, *s.* 3, *to force him "to limit the Description of his Workmen."*] The respondent, a master builder, had in his employ several carpenters who were members of a carpenters' union, and also one, J. J., who was not a member. The appellant, who was secretary to a branch lodge, served the respondent with the following notice in the middle of a week:—"I am requested by the committee of carpenters to give the men in your employ notice to come out on strike against J. J., unless he become a member of the society. This notice will be carried out after the end of this week, unless settled in accordance with the society's laws:"—*Held*, that the appellant was rightly convicted, under 6 Geo. 4, c. 129, s. 3, of having by threats endeavoured to force the respondent "to limit the *description* of his workmen."

SKINNER, Appellant; KITCH, Respondent 393

5. ——————————, *Railway Company, Liability of, for Acts of their Servants—Evidence of implied Authority—Arrest of Passengers* —8 *Vict. c.* 20, *ss.* 97, 103, 104.] The plaintiff, having taken a horse to an agricultural show by the defendants' railway, was entitled, under arrangements advertised by the defendants, to take the horse back free of charge on the production of a certificate. The plaintiff accordingly produced a certificate, and the horse was put into a box without payment or booking, and the plaintiff, having taken a ticket for himself, proceeded by the same train. At the end of the journey the station master demanded payment for the horse, and the plaintiff, refusing to pay, was detained in custody by two policemen under the orders of the station master, until it was ascertained by telegraph that all was right. An action having been brought against the defendants for false imprisonment:—*Held*, that a railway company has power to apprehend a person travelling on the railway without having paid his own fare, but has power only to detain the goods for non-payment of the carriage; consequently, as the defendants themselves would have had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no

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authority implied from them to the station master to detain the plaintiff on this assumption; and they were, therefore, not liable for this act of the station master. *Goff* v. *Great Northern Railway Company* (30 L. J. (Q.B.) 148; 3 E. & E. 672), and other cases, distinguished on this ground.

POULTON *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY 534

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MEASURE OF DAMAGES—*Non-delivery of Goods under Contract of Sale—Forbearance of Buyer at Seller's Request—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 17.] The defendant by bought and sold notes contracted to sell to the plaintiff 500 tons of iron, delivery to extend to the 25th of July. The defendant delivered none of the iron by that date, nor up to the February following, when the plaintiff went into the market; and, the price having risen since July, he sought to recover from the defendant, as damages for his breach of the contract of sale, the difference between the contract price and the market price in February. There was parol evidence from which the jury might infer that the plaintiff's delay was at the defendant's request. The jury having returned a verdict for the full amount claimed:—*Held*, that the evidence went to shew, not a new contract, but simply a voluntary forbearance by the plaintiff at the request of the defendant, and the Statute of Frauds, therefore, did not apply, and the plaintiff was entitled to a verdict for the full measure of damages.

OGLE *v.* EARL VANE 275

MERCANTILE LAW AMENDMENT ACT, 1856, s. 1 642
See SHERIFF. 2.

MERCHANT SHIPPING ACT, 1854, ss. 353, 388 65
See SHIP AND SHIPPING. 1.

METROPOLIS MANAGEMENT ACT, ss. 110, 111 264
See NEGLIGENCE. 1.

METROPOLIS MANAGEMENT AMENDMENT ACT, 1862 (25 *& 26 Vict. c.* 102), *ss.* 98, 107—*Formation and Width of Streets—Time of Commission of Offence.*] By s. 98 of the Metropolis Management Amendment Act, 1862, no existing road or way being of less width than forty feet shall (after 1862) be formed or laid out for building as a street for the purposes of carriage traffic, unless it be widened to the full width of forty feet, the measurement to be taken half on either side from the centre of the roadway to the external wall or front of the houses; but when forecourts are intended to be left in front of the houses, the width shall be measured from the fence dividing the forecourts from the public way. By s. 107, no person is to be liable to penalties unless complaint be made within six months after the commission or discovery of the offence. In 1864, several plots of land abutting on one side of a lane were sold for building purposes; the lane was an ancient carriage way, and had buildings at intervals on both sides erected before 1862; the lane varied in width from forty-one feet to twenty-eight feet, which was the width opposite the plots, and on the other side of the road was a permanent inclosure belonging to a church and other buildings erected before 1862. In July, 1865, A. bought the plots, houses having been built on two of them, the front walls of the houses being twenty-seven feet from the old wooden boundary fence of the lane. On the 26th of September, 1865, A. began to remove this fence, which had been left untouched, and to substitute a permanent wall and railing, and the work was completed on the 14th of October. On the 6th of October, the Board of Works were informed of what A.

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was doing, and in March, 1866, they laid an information against him to recover penalties for contravening the statute. At the hearing the magistrate found that A., by taking down the old fence and erecting the permanent fence, did begin to form and lay out the road for building as a street on the 26th of September, and completed such forming on the 14th of October; that the road was not required by s. 98 to be widened to forty feet from the opposite fence, but only to the width of twenty feet from the centre of the roadway to the boundary fence of A.'s ground; and he convicted A. in certain penalties:—*Held*, that the conviction was right.

TAYLOR, Appellant; THE METROPOLITAN BOARD OF WORKS, Respondents 212

2. METROPOLIS MANAGEMENT AMENDMENT ACT, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—"*General Line of Buildings*"—*Certificate of Superintending Architect, when to be given.*] The appellant having premises in a street, the original line of houses being some distance from the highway, with a forecourt in front, applied to the Metropolitan Board of Works, under 25 & 26 Vict. c. 102, s. 75, for leave to erect a building on this forecourt; the board granted a consent conditioned that the building was not erected higher than the next adjoining; this consent the appellant never took up, but he erected a building higher than the next adjoining. The vestry of the parish then made complaint before a magistrate, charging that the appellant had erected a building beyond the general line of buildings, contrary to the conditions of consent of the board, and in contravention of s. 75. The day before the hearing of the complaint, the superintending architect of the board certified that the "original line of buildings" was the "general line of buildings." The magistrate held the complaint proved, and ordered that the appellant should demolish so much of the building as was beyond the general line of buildings fixed by the architect:—*Held*, that the order was right. *St. George, Hanover Square* v. *Sparrow* (16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118) discussed.

BAUMAN, Appellant; THE VESTRY OF ST. PANCRAS, Respondents 528

METROPOLITAN BOARD OF WORKS, liability of, for subsidence of road 264

See NEGLIGENCE. 1.

METROPOLITAN BUILDING ACT, 1855 (18 & 19 *Vict. c.* 122), *ss.* 83, 85—*Obstruction to Light.*] The Metropolitan Building Act, 1855, s. 83, par. 6, which gives "a right to the building owner to raise any party structure permitted by this act to be raised, upon condition of making good all damage occasioned thereby to the adjoining premises," does not authorize the raising of a structure so as to obstruct ancient lights in the adjoining premises.

CROFTS *v.* HALDANE AND ANOTHER 194

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MISREPRESENTATION, rescission of contract on ground of 580

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MUNICIPAL CORPORATION—*Town Councillor, Election of—Mayor "incapable of acting"—Returning Officer, Election of Alderman in Place of Mayor—Eligibility of Mayor as Candidate for Town Councillor—Municipal Corporations Act* (5 & 6 *Wm.* 4, *c.* 76), *ss.* 28, 36.]

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Section 36 of 5 & 6 Wm. 4, c. 76 enacts "that if the mayor of any borough shall, at the time when it shall be necessary to execute the powers and duties herein provided with respect to elections, be dead, absent, or otherwise incapable of acting, the council of such borough shall forthwith elect one of the aldermen to execute all such powers and duties in the place of the mayor." In a borough not divided into wards, the mayor, being returning officer, offered himself for re-election as town councillor, and the council elected one of the aldermen to act at the election in the place of the mayor; the mayor was re-elected a town councillor:—*Held*, that the mayor was not disqualified as a candidate, but he could not act as returning officer; that he was "incapable of acting" within the meaning of the section; and, consequently, that the appointment of the alderman as substitute and the election were valid.

THE QUEEN *v.* WHITE 557

NEGLIGENCE—*Highway—Metropolitan Board of Works, Liability of, for Subsidence in Road—Metropolis Management Acts* (18 & 19 *Vict. c.* 120, *ss.* 110, 111, 135; 25 & 26 *Vict. c.* 102, *s.* 33).] The defendant, under a contract with the Metropolitan Board of Works, opened a public highway, not being a turnpike road, in a metropolitan parish, for the purpose of constructing a sewer; three or four months after the work was finished damage ensued from plaintiff's horse stumbling in a hole in the road. The filling in of the road had been properly done by the defendant, and the hole was owing to the natural subsidence of the materials, which sometimes takes place, sooner or later, after such an excavation:—*Held*, that the defendant was not liable for the damage; for that, there being no clause in the Metropolitan Management Acts *directly* applicable to such a case, the obligation of the defendant, as between him and the public, ceased as soon as he had properly reinstated the road, it being the duty of the parish authorities to look after the subsequent repairs, whether rendered necessary by subsidence or ordinary wear and tear.

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2. ————, liability of master for, of servant 33
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3. ————, liability for damage caused by, of pilot 65
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4. ————, liability of railway company for, causing damage to a child whose fare without fraud had not been paid 442
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———, bastardy, jurisdiction of, justices to make, after a previous dismissal of the case 466
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POOR—*Removal—Irremovability—Break of Residence—Absence of Wife with her Husband on Service as a Soldier*—9 & 10 *Vict. c.* 66, *s.* 1.] A husband and wife had resided for five years in a parish, when he enlisted for a soldier, and they both followed the regiment abroad for several years, till his death, when the widow returned immediately to the same parish, and after a month's residence became chargeable, when an order was obtained to remove her to her husband's parish of settlement:—*Held*, that she had not become irremovable; as the wife's absence with her husband while he is on service as a soldier is not excepted in the 9 & 10 Vict. c. 66, s. 1.

THE OVERSEERS OF EASTON, Appellants; THE OVERSEERS OF ST. MARY, MARLBOROUGH, Respondents 128

2. ——, *Removal—Union Chargeability Act*, 1865 (28 & 29 *Vict. c.* 79), *ss.* 1 & 2—*Form of Order when Removing Parish not in Union formed under* 4 & 5 *Wm.* 4, *c.* 76, *s.* 26.] The Union Chargeability Act, 1865, s. 1, only applies to a union formed under 4 & 5 Wm. 4, c. 76, s. 26; and s. 2 is confined to the case of a pauper relieved in *such* a union. Where, therefore, a pauper is chargeable to a parish, which is not united with any other parish, and in which the poor laws are administered by a board of guardians under 4 & 5 Wm. 4, c. 76, s. 39, the order of removal is rightly made, as if the act of 1865 had not passed, on complaint of the overseers of the removing parish, and rightly addressed to the overseers of the parish of settlement, although the latter parish is in a union formed under 4 & 5 Wm. 4, c. 76, s. 26.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF THE TOWNSHIP OF HUNSLET, Respondents *v.* THE GUARDIANS OF NORTHWICH UNION AND THE OVERSEERS OF THE TOWNSHIP OF DARNHALL, Appellants 383

3. ——, *Removal—Irremovability—Residence of Husband in one Parish, Wife residing in another*—9 & 10 *Vict. c.* 66, *s.* 1.] A surgeon in a private lunatic asylum in the parish of N. married, and, being required to board and lodge in the asylum, he took lodgings for his wife in the parish of P., about eight miles distant, and he was in the habit of visiting her nearly weekly, and staying with her from the Saturday evening to the Monday morning; the wife had thus lived in P. for six years, when, the husband having been convicted and sentenced to imprisonment, she became chargeable to P.:—*Held*, that the husband had been resident in N., and not in P., and that the wife and her children were therefore removable from P.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF SAINT PANCRAS, Respondents *v.* THE OVERSEERS OF NORWOOD, Appellants 457

POOR-RATE—*Rateable Value—Right to take Game, when to be taken into Account.*] An owner of land, who is himself the occupier, but lets the right to take game to another, is assessable to the poor-rate in respect of his occupation as enhanced in value by the right to take game. *Reg.* v. *Thurlstone* (28 L. J. (M.C.) 106; 1 E. & E. 502) discussed.

THE QUEEN, ON THE PROSECUTION OF MEYRICK, Appellant *v.* THE GUARDIANS OF THE POOR OF BATTLE UNION, Respondents 8

2. ——————"*Saleable Underwoods*"—43 *Eliz. c.* 2, *s.* 1.] The question whether woods are "saleable underwoods," and so rateable to the relief of the poor under 43 Eliz. c. 2, s. 1, depends on the mode and object of their cultivation; and if these be to produce a succession of profitable crops from the same stools and roots, the woods so treated are "saleable underwoods;" and it is immaterial at what intervals the successive crops are cut, and of what species of tree the woods consist.

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3. POOR-RATE—*Railway—Rateable Value—Running Powers—Easement.*] Under the provisions of certain acts of Parliament, a railway was constructed from G. to C.; half belonged to the G. W. Company, and half to the M. Company; each company had running powers over the half belonging to the other company, but neither company were liable to pay tolls to the other. The M. Company's traffic over the railway was much larger and more profitable than that of the G. W. Company. The G. W. Company being rightly assessed to the poor-rate of B., as sole occupiers of the part of their half of the railway in that parish, the rateable value of this occupation was arrived at by taking the amount of the G. W. Company's profits in the parish, and adding the sum which the M. Company, if they had not had the right of running free, would have had to pay to the G. W. Company, in respect of that part of the railway:—*Held*, that this was wrong, and that the rateable value of the G. W. Company's occupation in B. was the amount of their own profits in that parish, enhanced only by the value to them of their right to run free over the M. Company's half of the railway.
THE GREAT WESTERN RAILWAY COMPANY, Appellants; THE OVERSEERS OF THE PARISH OF BADGWORTH, Respondents .. 251

4. ————, *Occupation—Occupation of Land subject to Profit à prendre—Municipal Corporation and Freemen.*] The soil of a common is vested in the municipal corporation of L., as lords of the manor, and each of the freemen, if resident within L., is entitled, as a personal privilege, to turn, at all times, on the common two head of cattle. The corporation repair the fences of the common, and preserve the rights of the freemen from being infringed; they appoint and pay out of the corporate funds a commons warden to check illegal stocking, and to inflict fines on those who illegally put in stock; part of the fines are paid to the corporate funds, and part to the commons warden; the corporation derive no benefit whatever from the common, but are losers by appointing and paying the commons warden:—*Held*, that the corporation were not rateable to the poor-rate in respect of the common, as, although they were owners and occupiers, it was subject to a profit à prendre in the freemen which exhausted the whole value of the occupation.
THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF LINCOLN, Appellants; THE OVERSEERS OF THE EXTRA-PAROCHIAL PLACE OF HOLMES COMMON, Respondents 482

5. ————, *Exemption of the Crown—Exemption of Buildings used for Government Purposes—Buildings occupied for Police Purposes, Assize Courts, &c.—43 Eliz. c. 2, s. 1.*] The chief constable and an inspector of the L. county police were rated to the poor-rate in respect of dwelling-houses, &c., which they severally occupied, and were required to occupy, in discharge of their respective duties, together with magistrates' room and other accommodation necessary for the purposes of police. The county constabulary were established under 2 & 3 Vict. c. 93, and are inspected annually by a Government officer, and, if the report is satisfactory, a grant is made by the Treasury in aid of the police rate:—*Held*, that the decision of the House of Lords in the *Mersey Docks Cases* (11 H. L. C. 443; 35 L. J. (M.C.) 1) had left untouched the principle on which buildings used for public Government purposes were exempt from rateability, as being occupied for the purposes of the Crown, and so not within 43 Eliz. c. 2, s. 1, the Crown not being named in the act; and that the premises in question came within this principle of exemption. The justices of the county of L. were rated to the poor-rate in respect of the "Castle," which comprised buildings used to keep the records of the county, as courts at the assizes and quarter sessions, judges' lodgings, &c. The "Castle" is

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Crown property, and was granted by letters-patent to the "constable," or his deputy, on condition that he should permit the above uses to be made of the buildings. The deputy constable, who was also deputy clerk of the peace, had a set of keys, and another set was kept by a "keeper," appointed by the justices and paid an annual salary by them. The justices had expended large sums in repairing and enlarging the buildings. They made no further use of them; but the buildings were also used for the sheriff, county, and revising barrister's courts, and for various public meetings, &c.:—*Held*, that the justices had no such occupation as rendered them liable to be rated. *Quære*, whether the "Castle," under the circumstances, was rateable at all?

THE QUEEN, ON THE PROSECUTION OF GOODYER AND ANOTHER, Appellants; *v.* THE INHABITANTS OF THE PARISH OF ST. MARTIN'S, LEICESTER, Respondents. THE QUEEN, ON THE PROSECUTION OF THE JUSTICES OF LEICESTERSHIRE, Appellants; *v.* THE INHABITANTS OF THE TOWNSHIP OF CASTLE VIEW, LEICESTER, Respondents 493

6. POOR-RATE—*Principle of Rating—Tithe Rentcharge—Rateable Value—Deduction for Curate's Salary—6 & 7 Wm. 4, c. 96.*] The principle of the decision of the House of Lords in the *Mersey Docks Cases* (11 H. L. C. 443; 35 L. J. (M.C.) 1), is that all property capable of beneficial occupation is to be assessed to the poor-rate irrespectively of the amount of remunerative value to the particular occupier. That principle is not consistent with the decision in the *Hackney Case* (E. B. & E. 1; 27 L. J. (M.C.) 233); in which, on rating a tithe rentcharge, a deduction was allowed to the incumbent in respect of the salary of a curate whose services were necessary, in addition to those of the incumbent himself, to the due discharge of the duties of the benefice; and which can only be supported on the ground that the incumbent was bound to employ a curate whom he had to pay out of the subject matter in respect of which he was rated, and the occupation by him of the rentcharge was rendered pro tanto less beneficial. The latter case must, therefore, be taken as overruled; and such a deduction ought not to be allowed.

THE QUEEN, ON THE PROSECUTION OF JOHN CHARLES CARWITHEN, Appellant; *v.* THE INHABITANTS OF SHERFORD AND OTHERS, Respondents 503

7. ——————*Rateable Value—Allowance for Repairs where Tenant does them—Allowance for future Renewal of Buildings and Machinery—6 & 7 Wm. 4, c. 96, s. 1.*] In assessing premises to the poor-rate the rent actually paid was taken as the "gross estimated rental;" this was a fair and bonâ fide rent on the terms that the landlord should find the chief materials for repairs and the tenant the other materials and cost of labour:—*Held*, that, in order to arrive at the rateable value, the cost of the repairs borne by the tenant ought not to be deducted. *Semble*, that, in assessing farms with farmhouses and buildings and a water corn-mill to the poor-rate, an allowance ought, in general, to be made in respect of the contingent or future renewal of buildings and machinery.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF BOXFORD AND OTHERS, Respondents; *v.* WELLS, Appellant .. 542

POSTPONEMENT, no fresh notice of trial necessary after, of trial by judge's order 406

See PRACTICE. 2.

PRACTICE—*Action—Staying Proceedings till Costs of former Action paid.*] Where a plaintiff, having failed in an action, brings a second

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action for substantially the same cause, unless the plaintiff satisfy the Court that a real probable cause of action exists, the proceeding is so primâ facie vexatious and harassing that the Court will stay the second action until the costs of the former action have been paid. The plaintiff brought an action of ejectment to recover tollgates, &c., as executor of a mortgagee of the tolls of a turnpike road, in order to enforce payment, but was unable to produce the mortgage deed, or prove the loss of it so as to give secondary evidence; and he was accordingly nonsuited. He admitted at the trial (as the fact was) that the testator had been bankrupt. After the trial the trustees of the road obtained a new act of parliament, and inserted the testator's name in a schedule as a mortgagee. The plaintiff then brought an action against one of the trustees, claiming a mandamus commanding the trustees to execute a fresh mortgage to the plaintiff as executor. Since the first action the plaintiff had become a bankrupt. The Court were of opinion that the two actions were substantially the same, and that under the peculiar circumstances of the case the second action was vexatious, and stayed the proceedings till the costs of the action of ejectment had been paid.
COBBETT, Executor, &c. *v.* WARNER 108

2. PRACTICE—*Notice of Trial—Postponement of Trial by Judge's Order.*] When the trial of a cause for which due notice of trial has been given is postponed from one sittings in London to the following sittings, by a judge's order obtained by the defendant, it is not necessary for the plaintiff to give a fresh notice of trial.
CLAUDET *v.* PRINCE 406

3. ————*Transmitting Case stated under* 20 & 21 *Vict.* c. 43, *s.* 2, *within Three Days—Computation of Time.*] The appellant having applied to justices to state a case under 20 & 21 Vict. c. 43, received the case from them on Good Friday, and transmitted it to the proper court on the following Wednesday:—*Held*, that, as the offices of the Court were closed from Friday until Wednesday, the appellant had transmitted the case as soon as it was possible to do so, and, therefore, had sufficiently complied with the requirements of the 2nd section, which directs that the case shall be transmitted by the appellant within three days after he has received it.
MAYER, Appellant; HARDING, Respondent 410

4. ————, who entitled to attachment against directors of a company being wound up, for refusing to answer interrogatories 37
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5. ———— as to granting rule for quo warranto 55
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6. ————, rent may be attached under Common Law Procedure Act, 1854, s. 61 259
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7. ————, service of notice in a cause 612
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8. ————, effect of variance between judge's order and the commission 652
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PRESCRIPTION, what kind of, requisite to establish a custom 161
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PRESUMPTION as to boundary of parish which extends up to a tidal river 4
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PRINCIPAL AND AGENT—*Order to Purchase, Construction and Revocation of—Usage of Place.*] The defendant, in London, wrote to the plaintiffs, commission agents at the Mauritius: "Should the beet crop prove less than usual, there may be a good chance of something being made by importing cane sugar, at about the limit I am going to give you as a maximum, say 26*s.* 9*d.* for Nos. 10 to 12, and you may ship me 500 tons, to cover cost, freight, and insurance; 50 tons more or less of no moment, if it enable you to get a suitable vessel." So large a quantity of sugar as 500 tons could not be purchased in one lot at the Mauritius, and it was the customary course of business there, in carrying out an order for a large quantity of sugar, to purchase it in smaller quantities from time to time of different persons. The plaintiffs had thus purchased for the defendant 400 tons, when prices rose, and before the order could be completed, the defendant countermanded it:—*Held*, that the clause as to "50 tons more or less" was not a limitation of the quantity to be purchased, but was a discretion left to the plaintiffs, that they might not be fettered in obtaining a vessel to carry the quantity ordered; that the letter was therefore simply an order to purchase 500 tons; but that the defendant must be taken to have been giving an order with reference to the circumstances of the Mauritius market; and therefore that each quantity, as it was purchased by the plaintiffs from the several sellers, was purchased on behalf of the defendant; and he was bound to accept and pay for the 400 tons.
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2. ——————, liability of shipowner of chartered vessel for acts of master 86
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3. ——————, principal effecting insurance in ignorance of material fact concealed from him by his agent, effect of 511
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PROBATE OF WILL, how far evidence as to realty 1, 612
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PROCEEDINGS of local board of health, form of 185
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PROCESS, protection order under s. 112 of 12 & 13 Vict. c. 106 is of no avail against a warrant of commitment under 43 Eliz. c. 2, s. 7 .. 549
See BANKRUPT. 4.

PROFIT À PRENDRE, liability to poor-rate in respect of land subject to 432
See POOR-RATE. 4.

PROSPECTUS, effect of misrepresentation in 580
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PROTECTION ORDER under s. 112 of 12 & 13 Vict. c. 106, not a protection from arrest under 43 Eliz. c. 2, s. 7 549
See BANKRUPT. 4.

PUBLIC HEALTH ACT, 1848 (11 & 12 *Vict. c.* 63), *s.* 64—*Newly establishing the Business of a Slaughterer of Cattle.*] By s. 64 of the Public Health Act, 1848, the business of a slaughterer of cattle, &c., or other noxious or offensive business, shall not be newly established in any building or place in any district, after the act has been applied to it, without the consent of the local board of health; and whosoever offends against this enactment shall be liable, for each offence, to a penalty of 50*l.* A cattle market company, cattle having never been slaughtered in the market before, after the act had been applied to the

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district, erected a building, in which they allowed persons to slaughter cattle on the payment of 2*s.* a head, the company finding the tackle attached to the building, but the persons slaughtering bringing their own implements:—*Held*, that the company were liable to the penalty.
THE LIVERPOOL NEW CATTLE MARKET COMPANY, Appellants; HODSON, Respondent 131

2. PUBLIC HEALTH ACT, 1848, ss. 34, 36, 69, 149 185
See LOCAL BOARD OF HEALTH. 2.

QUO WARRANTO, *Void Election—Resignation of Office—Disclaimer—Practice—Costs.*] The Court will make a rule for a quo warranto information absolute, although the defendant has resigned the office and his resignation has been accepted before the rule was obtained, where the object of the relator is, not only to cause the defendant to vacate the office, but to substitute another candidate at once in the office; as in such a case the relator is entitled to have judgment of ouster or a disclaimer entered on the record. In making the rule absolute, the Court will exercise a discretion as to costs.
THE QUEEN *v.* BLIZARD 55

2. ——— upon void election of members of local board of health 16
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RAILWAY COMPANY—*Compensation—Lands injuriously affected—Nuisance by Vibration, Noise, and Smoke, after Construction of Railway—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18) *s.* 68 *—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 6 *&* 16.] The owner of a house, none of whose lands have been taken for the purposes of the railway, can recover, against the company who constructed the railway, compensation under ss. 6 & 16 of the Railways Clauses Consolidation Act, 1845, in respect of injury to the house (which, though not structural, depreciates its value), caused by vibration, smoke, and noise, in running locomotives, by another company, with trains in the ordinary manner, after the construction of the railway. So held, reversing the judgment of the Court of Queen's Bench, by Bramwell, B., Keating and Montague Smith, JJ.; Channell, B., dissenting.
BRAND AND WIFE *v.* THE HAMMERSMITH AND CITY RAILWAY COMPANY .. .. Ex. Ch. 223

2. ——— *Liability for Negligence to a Passenger who, without Fraud, had not paid his Fare—Child above Three and under Twelve Years of Age—*7 *&* 8 *Vict. c.* 85, *s.* 6.] By 7 & 8 Vict. c. 85, s. 6, railway companies are bound to carry, by certain trains, children under three years of age without charge, and are entitled to half the fare charged for an adult in respect of all children between three and twelve years of age. The plaintiff's mother, carrying in her arms the plaintiff, a child of three years and two months old, took a ticket for herself by one of these trains on the defendants' railway, but did not take a ticket for the plaintiff; in the course of the journey an accident occurred through the negligence of the defendants, and the plaintiff was injured. At the time the plaintiff's mother took her ticket no question was asked by the defendants' servants as to the age of the child; and there was no intention on the part of the mother to defraud the company:—*Held*, that the plaintiff was entitled to recover against the defendants for the injury he had received.
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RAILWAYS CLAUSES CONSOLIDATION ACT, 1845 (8 *Vict.* c. 20), *s.* 16—*Highway, Diversion of—Parliamentary Plan—Mandamus.*] The defendants constructed, under an act of parliament, a railway which crossed a carriage highway on a level at two places, thereby cutting off on the west a bend in the highway thirty chains in length from the rest of the highway, and made a new road on the east side of the line parallel to it, connecting the two ends of the highway from which the bend was cut off. Under their act they had no special authority to cross this highway on a level, nor to divert it, but on the deposited plan "Proposed Diversion of Road" was shewn in the direction in which the new road was made, and they had power by their act to make the railway on the line delineated upon the plan. By 8 Vict. c. 20, s. 16: "It shall be lawful for the company, for the purpose of constructing the railway, to . . . . divert or alter, as well temporarily as permanently, the course of any roads, streets, or ways, or sink the level of any such roads, &c., in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper":—*Held*, that neither the delineation on the plan, without special power in their act, nor s. 16 of 8 Vict. c. 20, authorized the defendants to permanently divert the road; and that, therefore, they were bound by s. 46 to carry the road over the railway, or the railway over the road, by means of a bridge, in order to connect the bend with the rest of the highway.
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SEWERS—*Sea-banks—Mortgagor, Liability of, to repair—Presentment—Costs of non-repair*—23 *Hen.* 8, *c.* 5, *s.* 3—3 *& 4 Wm.* 4, *c.* 22.] A mortgagor, not in actual possession, but in receipt of the rents and profits of lands charged with repair of a sea-bank, is liable for default of reparation. Notwithstanding 3 & 4 Wm. 4, c. 22, s. 15, the commissioners of sewers, under 23 Hen. 8, c. 5, s. 3, have power to repair a sea-bank, and fine the person whose lands are charged with the repairs without giving him any notice; therefore a presentment, which does not allege notice to repair, but states that the costs and charges of repairing amount to a certain sum, and a judgment thereon, ordering that payment, are good.
THE QUEEN *v.* BAKER 621

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SHERIFF—*Disqualifying Interest — Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 39.] The interest which at common law disqualifies an officer from acting in a judicial inquiry must be direct and certain, and not merely remote or contingent; and the same principle must be applied to s. 39 of the Lands Clauses Consolidation Act. Where, therefore, at the time of the summoning of a jury and the taking of an inquisition before the sheriff as to the amount of compensation to be paid for land taken by a railway company under the powers of their act of parliament, there was an executory agreement not yet carried out, by which that company would ultimately become amalgamated with another railway company, and the sheriff was a shareholder in the latter company:—*Held*, that the sheriff was not "interested in the matter in dispute" within the above section, so as to invalidate the proceedings.
THE QUEEN *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY 336

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2. SHERIFF—*Action for not levying—Proof of Damage — Conveyance of Goods, when it passes Property—Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 1—*Delivery of Writ when binding on Assignee of Goods—Knowledge of Assignor, Knowledge of Assignee.*] An action cannot be maintained against a sheriff for negligence in not levying under a fi. fa. without shewing actual pecuniary damage; and although primâ facie the measure of damage is the value of the goods which might have been and were not levied, yet it is for the jury to say, looking at the probabilities of the case, whether or not, if the execution had been levied, the plaintiff would have derived any benefit from it, by reason of the other creditors of the execution debtor being in a position to make him bankrupt. A conveyance by a debtor of his goods to two creditors for the benefit of themselves and the other creditors passes the property at once, on the execution of the deed by the debtor, without any assent on the part of the trustees; but the knowledge of the debtor, at the time of making the deed, that a writ of execution is out against his goods, must be taken to be the knowledge of the trustees within the proviso of s. 1 of the Mercantile Law Amendment Act, 1856; and consequently the trustees' title is not protected by that section, and the goods are bound by the delivery of the writ to the sheriff.

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SHIP AND SHIPPING—*Damage by Negligence of Pilot—Pilotage, when compulsory on British Ship—Port of Newcastle-upon-Tyne*—41 *Geo.* 3, *c.* 54 — 6 *Geo.* 4, *c.* 125, *ss.* 58, 59, 89 — *Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 353, 388.] By a local act for the port of Newcastle-upon-Tyne, pilots are licensed for the port, and foreign ships are obliged to employ a licensed pilot in the port, with a proviso that nothing in the act shall extend to oblige owners or masters of British ships to employ a pilot, if not desirous so to do. By 6 Geo. 4, c. 125, ss. 58, 59, every master of any ship, with certain exceptions, is subject to a penalty if he pilot his vessel himself or by any other than a pilot licensed and qualified for the district in which the ship may be. By s. 89, "Nothing in this act shall extend . . . to alter or repeal any provisions in any act relating to the pilots of any ports in relation to which particular provision shall have been made in any act as to pilots or pilotage, or to the pilotage within the limits prescribed by any act relating to pilotage for such ports:"—*Held*, that, assuming s. 58 would otherwise have made it compulsory on a British vessel to employ a licensed pilot in the Tyne, the case was within s. 89, and therefore it was not compulsory by law on a British ship to employ a licensed pilot in the Tyne at the time the 17 & 18 Vict. c. 104 came into operation; and consequently the owner is not protected by s. 388 from liability for damage occasioned by the fault of a qualified pilot in charge of the ship. *Dodds v. Embleton* (9 D. & R. 27) affirmed.

THE TYNE IMPROVEMENT COMMISSIONERS *v.* THE GENERAL STEAM NAVIGATION COMPANY .. .. Ex. Ch. 65

2. ——————————*Charterparty—Bill of Lading—Liability of Owner of chartered Ship—Principal and Agent—Master and Shipowner—Carrier—Liability for Stowage of Goods—Stevedore.*] A ship was chartered for a voyage from Oporto to the United Kingdom, to load from the factors of the affreighter a full cargo of wine or other merchandize at 18s. per ton; the captain to sign bills of lading at any rate of freight without prejudice to the charter; the ship to be addressed to charterer's agents at Oporto on usual terms. The ship was accordingly consigned to the charterer's agents at Oporto, and was put up by them as a general ship, without any intimation that she

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was under charter; the plaintiff shipped some casks of wine, and received bills of lading in the common form signed by the master. The wine was stowed by a stevedore appointed by the charterer's agents and paid by them, the money being ultimately repaid them by the master. The wine having leaked from improper stowage:—*Held*, that as the charter did not amount to a demise of the ship, and the owners remained in possession by their servants, the master and crew, the shipper was entitled to look to the owners as responsible for the safe carriage of the wine: inasmuch as he had delivered it to be carried in the ship in ignorance that she was chartered, and had dealt with the master, who was still the owners' master, as clothed with the ordinary authority of a master to receive goods and give bills of lading by which his owners would be bound:—*Held*, also, that the employment of the stevedore made no difference, at all events as regarded the shipper, as he was no party to the employment, and had a right to look to the owners for the safe stowage of the goods, as part of the carrier's duty, in the absence of any special agreement.

Quære, whether the charterer also would not have been liable to the shipper on the bills of lading signed by the master in furtherance of the charterparty.

SANDEMAN AND OTHERS *v.* SCURR AND OTHERS 86

3. SHIP AND SHIPPING—*General Average—Sailing Ship with Auxiliary Steam Screw—Substitution—Cost of extra Coals.*] A clipper sailing ship of 2000 tons, with an auxiliary steam screw of 130 horse power, and carrying about 550 tons of coal, sailed on a voyage from Australia to England. After eleven days she came in collision with an iceberg, and suffered so much damage in her masts and upper works on one side, as practically to have lost all power of sailing. She reached Rio de Janeiro under steam alone, having nearly exhausted her stock of coals. The repairs necessary to restore her sailing powers would have cost at Rio many thousand pounds more than in England, and would have occupied several months, and the cargo would have had to be unshipped and warehoused. The captain, therefore, had only temporary repairs done (which took three days) sufficient to enable him to complete his voyage under steam alone; and in order to do this he had to purchase coals at Rio, and again at Fayal. The voyage having been accomplished under steam alone, the shipowners sought to charge the cost of the coals against shippers of cargo as general average: either on the principle that the expenditure was a substitution, beneficial to all parties, for a greater expenditure, which the captain had a right to incur by repairing at Rio, and ought to be apportioned in the same way as the greater expenditure would have been; or, as an extraordinary expenditure for the general advantage of all interests concerned:—*Held*, assuming the repairing at Rio would have been justifiable, and any of the incidental expenses chargeable against the shippers as general average, that there was no legal principle on which expenses incurred by one course could be apportioned according to what might have been the facts if a different course had been adopted. Secondly, that the shipowners, by the contract of affreightment on such a ship, were bound to give the services of the auxiliary screw and to make all the necessary disbursements for fuel: and although the circumstances caused these disbursements to be extraordinarily heavy, they did not render them an extraordinary expenditure within the rule as to general average.

WILSON AND ANOTHER *v.* THE BANK OF VICTORIA 203

4. ——————————, *Charterparty, Construction of, with Reference to Port of Loading—"Detention by Ice and Quarantine not to be reckoned as Laying Days."*] A charterparty provided, that the ship

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should proceed to Sulinah, or outside, in sufficient depth of water to load the ship, and there load from the agents of the merchants a complete cargo of grain. The cargo to be brought and taken from alongside the ship at the ports of loading and discharge at charterer's expense and risk. Thirty running days to be allowed (if the ship be not sooner despatched) for loading and unloading, and ten days on demurrage, over and above the laying days, at 6*l.* a day; *detention by ice and quarantine not to be reckoned as laying days.* There are no storehouses at the port of Sulinah itself; but the grain shipped at Sulinah is kept at places higher up the Danube, and is brought by steam lighters down the river and unloaded into ships waiting their lading at Sulinah. The ship being ready to load notice was given to the charterer; but after six days, before any cargo had been supplied, the river immediately above Sulinah became frozen up, and so remained for two months, the port of Sulinah itself remaining open. The ship having been thus delayed waiting for cargo:—*Held*, that, as from the circumstances of the port the cargo had to be brought down the river after the arrival of the ship, "detention by ice" must be construed to extend to detention by ice of the lighters coming down the river to load the ship; and that the shipowner could not recover demurrage or damages for the time during which the river above Sulinah was frozen:—*Held*, also, that the ignorance of the shipowner as to the circumstances of the port did not affect the question; nor did the fact that the charterer by greater diligence might have loaded the ship before the navigation was interrupted, as he was entitled to the whole of the laying days, which would have been sufficient had not the navigation been interrupted.

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STAMPS—"*Charterparty*," *&c.—Guarantee for the Performance by the Charterer of a Charterparty—5 & 6 Vict. c. 79, s. 2, and sch.*] A guarantee for the due performance of a charterparty does not require to be stamped, as "charterparty or agreement for the charter of any ship, or any memorandum, letter, or other writing between the captain or owner of any ship and any other person, for or relating to the freight or conveyance of goods, &c. on board such ship," &c. within 5 & 6 Vict. c. 79, s. 2, and sch.

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been previously sentenced :"—*Held*, that where the defendant is summarily convicted at one time of several distinct offences, the justices have power, under the above section, to award that the imprisonment under one or more of the convictions shall commence at the expiration of the sentences previously pronounced.
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